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POLITICAL ALCHEMY, THE LONG TRANSITION, AND LAW'S PROMISED EMPIRE: HOW JULY 1, 1997 MATTERS — AND DOESN'T MATTER — IN HONG KONG'S RETURN TO CHINA

JACQUES DELISLE*

1. INTRODUCTION

At midnight on June 30, 1997, the billboard-size digital clock that stands in front of the Museum of the Revolution and the Museum of History at Beijing's Tiananmen Square will reach zero in its countdown to China's "resumption of the exercise of sovereignty over Hong Kong."¹ More than a thousand miles away, the Union Jack will have been lowered for the last time over Government House in Hong Kong, and official celebrations will begin, marking China's recovery of the second greatest of the remaining prizes in its long march toward national reunification and the recovery of lost lands.² The "borrowed place on borrowed time"³ will have ended its century-and-a-half run as a

* Assistant Professor, University of Pennsylvania Law School. The author thanks the University of Pennsylvania Research Foundation for supporting work on this article and the author's broader collaborative project on Hong Kong, 1997, on which this article draws. The author also thanks Jennifer Shiu-Li Fan and Richard Sik-Wing Au for providing excellent and efficient research assistance.

¹ The phrase originated in The Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 1985 Gr. Brit. T.S. No. 26 (Cmd. 9543), para. 1 [hereinafter Joint Declaration].

² Taiwan is, of course, the most important object of the P.R.C.'s reunification drive. Indeed, China's handling of Hong Kong's return is widely seen as an audition for prospective reunification with Taiwan — a feature which some see as the best guarantee Hong Kong has that P.R.C. authorities will restrain themselves and respect the promised "high degree of autonomy" for the S.A.R. Macao, the other remaining colonial outpost on the south China coast, is set to return in 1999, when Portuguese rule — long since largely ceded in practice to P.R.C. authorities — will formally terminate.

³ The phrase, originating with Chinese author Han Suyin, has stuck as an apt description of the city-state's predicament. See, e.g., RICHARD HUGHES, *BORROWED PLACE, BORROWED TIME: HONG KONG AND ITS MANY FACES* (1968).

British colony and become the first Special Administrative Region ("S.A.R.") within the People's Republic of China ("China" or "P.R.C."). Such a theatrical and formally transformative moment inescapably draws our attention, prompting us to call together symposia to assess its meaning and implications. It provides a compelling occasion for the contributors to this volume and for countless other participants in — and observers of — Hong Kong affairs to examine the prospects for the people and places most affected by those changes. It also presents an opportunity for attracting notice from a world in which seemingly more gradual developments of the same magnitude can be driven from the stage by the fleeting crises of the day.

Less certain is what this moment of high drama will mean — for Hong Kong itself, for the P.R.C., and for a watching world. July 1, 1997, does indeed loom as a defining moment when viewed from a perspective that sees the profound contrasts between the People's Republic and the crown colony as mattering most, and regards the implementation of the S.A.R.'s political and legal structure as a principal means for bridging or accommodating those differences in the immediate aftermath of reversion. The official date of reversion recedes into relative insignificance, however, from a perspective that stresses points of similarity, convergence, and gradual integration across the soon-to-vanish international border, and that is skeptical about whether much turns on the introduction of new formal institutions and laws for "Hong Kong, China."⁴ From a third perspective, the arrangements for Hong Kong's return to China are remarkable for the extraordinarily central role they appear to accord to law and legal forms. Whether "law" succeeds or fails in performing those roles, on this view, is a matter of great material and normative significance for Hong Kong, the P.R.C., and for the international community — in general, and especially in those segments that value the rule of law.

⁴ That awkward appellation is what the Basic Law authorizes the S.A.R. to use in post-1997 participation in international relations, organizations, and treaty-like arrangements. See Joint Declaration, *supra* note 1, annex I, § XI; Zhonghua Renmin Gongheguo Xianggang Tebie Xingzheng Qu Jiben Fa [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China], Apr. 4, 1990, art. 150 ZHONGHUA RENMIN GONGHEGUO FALÜ FAGUI (Huoye) 1-4-O-I•1., translated in 29 I.L.M. 1520 [hereinafter Basic Law].

Which of the divergent predictions rooted in the first pair of perspectives will prove nearer the truth, and to what degree law can play the promised roles that are the focus of the third perspective, all depend on answers to questions that do not yet yield widely convincing answers — and may not for years to come. Nonetheless, each of these three perspectives sheds light on some facet of Hong Kong in transition and points us to issues that are likely to matter well beyond 1997 — for Hong Kong, for China, and for others with significant material and normative stakes in what happens to Hong Kong.

2. *Political Alchemy: The Interaction Of Opposites and the Institutional Solution*

Hong Kong's return to China is no "ordinary" change of sovereignty or regime. It is not simply a latter-day echo of the once commonplace negotiated transfer of power from a withdrawing imperial power to new rulers with a different *de jure* and *de facto* approach to law and governance. Such a change would be remarkable in Hong Kong's case only for having come so long after the main wave of post-World War II decolonization and for resulting in an arrangement other than independence for the territory.⁵ More than mere tardiness distinguishes Hong Kong's impending transition from colonial rule. Britain's "restor[ation] of Hong Kong" to China, and China's simultaneous "resum[ption] of] the exercise of sovereignty" over Hong Kong — and the undertakings to do so under the terms set forth in the Sino-British Joint Declaration on the Question of Hong Kong and the Basic Law for the Hong Kong S.A.R. — appear to herald a moment of political alchemy, with "political" read broadly.⁶ July 1, 1997

⁵ On Hong Kong's anomalous status in this regard, see generally HURST HANNUM, *SOVEREIGNTY AND SELF DETERMINATION* 129-51 (rev. ed. 1996).

⁶ Joint Declaration, *supra* note 1, paras. 1 & 2. The phrasing of paragraph 1 reflects China's position that the "unequal treaties" ceding sovereignty over Hong Kong Island and Kowloon (as well as granting a ninety-nine-year lease on the New Territories) were invalid, and that China accordingly had always remained Hong Kong's sovereign. The Joint Declaration, therefore, could not be a sovereignty-(re)transferring treaty. It merely provided the occasion for China's establishing a time-table for beginning again to exercise the legal power it had never relinquished. Paragraph 2, in contrast, reflects the British position that the first two treaties were valid, sovereignty-transferring instruments and the Joint Declaration was an agreement of equal dignity effecting the return to China of sovereignty over the territory.

thus promises, and threatens, to be the moment when seemingly antithetical elements of two radically different systems must finally be thrust together — and the elaborate legal and institutional vessels constructed to contain their interaction tested — with unpredictable consequences.

2.1. *Economics: Contrasts and Gaps*

The points of undeniable contrast and possible incompatibility between the “two systems” (*liangzhi*) that will be formally integrated in “one country” (*yiguo*) are wide-ranging and fairly fundamental.⁷ In the economic realm, Hong Kong and the P.R.C. face obvious challenges in bridging ideological and economic gaps, and related differences in legal and institutional structures. Although Hong Kong has been a less pure bastion of *laissez-faire* principles than is popularly imagined, it remains a near-paragon of free-market capitalism, lightly regulated internally and strikingly open to the global economy. The colony’s civil service-dominated government is widely regarded — and regards itself — as committed to facilitating commerce and business and to maintaining a legal regime of low taxes, zero tariffs (on all but a handful of goods), and free investment flows for the territory while supporting a liberal economic order at multilateral and global levels. Government forays into “industrial policy” have been limited, confined to such modest measures as providing infrastructure, offering discounted land leases to encourage the development of industrial estates, and disseminating information or providing advice to business on prospective growth industries, trade, and investment.⁸ Local companies are easily established

⁷ Deng Xiaoping first articulated the formula of “one country, two systems” (*yiguo, liangzhi*) as a recipe for reunification of Taiwan with mainland China. The phrase was adopted to summarize the P.R.C.’s policy on Hong Kong, and is ubiquitous in the discourse on post-1997 Hong Kong, is enshrined in the preamble to the Basic Law, is liberally laced in policy statements by politicians and officials of every hue, and even lends its name to a prominent “pro-China” think tank in Hong Kong (the “One Country Two Systems Economic Research Institute”).

⁸ See, e.g., STEPHAN HAGGARD, *PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN NEWLY INDUSTRIALIZING COUNTRIES* 151-53, 200 (1990); NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 47-49 (5th ed. 1995); EZRA F. VOGEL, *THE FOUR DRAGONS: THE SPREAD OF INDUSTRIALIZATION IN EAST ASIA* 70-72 (1991).

and face few restrictions on their scope of business activities.⁹ Government control of capital flows is so minimal that official statistics are concededly uncertain.¹⁰ As a result of such traits, the territory consistently rates at the top of indices of "economic freedom," international economic openness and foreign trade-Gross Domestic Product ("GDP") ratios, and has succeeded in attracting hundreds of multinational corporations to make the territory their base for East Asian or Southeast Asian regional operations.¹¹

In its official norms and the rules and institutions that implement them, China's economic system remains strikingly different. While "economic system reform" (*jingji tizhi gaige*) and, more recently, the construction of a "socialist market economy" (*shehuizhuyi shichang jingji*) have been central pillars of P.R.C. policy during two decades of reform, China's economy remains socialist in key respects.¹² The role of central planning has plummeted from the relatively pale imitation of Soviet economics that characterized the high Maoist era. The share of GDP produced by state enterprises (defined very narrowly) has fallen steadily, to less than half of industrial output in recent years, and new laws have provided those enterprises with greater rights to operational autonomy and a mechanism for converting into share-issuing corporations.¹³ At the same time, China's policy of

⁹ On recent changes to make the Companies Ordinance still less restrictive, see Nick Tabakoff, *Companies Win More Freedom in Ordinance Overhaul*, S. CHINA MORNING POST, Feb. 11, 1997, at 2.

¹⁰ See, e.g., HAGGARD, *supra* note 8, at 203.

¹¹ See, e.g., HERITAGE FOUNDATION, 1997 INDEX OF ECONOMIC FREEDOM 220 (1996); Sharon Cheung Po-wah, *Territory is in Top Three for Openness*, S. CHINA MORNING POST, Sept. 6, 1995, at 12; Bruce Gilley, *Just in Case . . .*, FAR E. ECON. REV., Aug. 8, 1996, at 53 (concerning multinational companies with Hong Kong regional headquarters); *U.S. Businessmen Confident in HK Commercial Prospects*, Xinhua News Agency, Sept. 19, 1994, in BBC, Survey of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (reporting on American Chamber of Commerce in Hong Kong statement).

¹² See, e.g., Decision of the Central Committee of the Chinese Communist Party on Some Issues Concerning the Establishment of a Socialist Market Structure (1993).

¹³ See generally BARRY NAUGHTON, GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM 1978-1993 26-51, 329-33 (1995); Zhonghua Renmin Gongheguo Quanmin Suoyouzhi Gongye Qiye Fa [P.R.C. Law on State-Owned Enterprises] (1988) [hereinafter *Qiye Fa*]; Zhonghua Renmin Gongheguo Gongsigongsi Fa [P.R.C. Company Law] (1993) [hereinafter *Gongsigongsi Fa*].

"opening to the outside world" (*duiwai kaifang*) has brought rapidly rising levels of foreign investment and trade, and the construction of a framework of laws that are at least partially compatible with international standards.¹⁴

Still, significant elements of planning and direct political control persist. Formally, China still issues Five Year Plans for the economy, which articulate the leadership's general economic policies (if not meaningful specific directives). Several key commodities have remained partially subject to production quotas and price controls. Some of the most massive and unreformed state companies loom large in key economic sectors and, therefore, in the leadership's fiscal and reform policy calculations. Especially at the local level, even nominally non-"state-owned" enterprises are often controlled by organs and officials of the Chinese Communist Party ("CCP" or "Party") and government institutions, or by people closely connected to them. And many large enterprises must retain underemployed workers and provide a vast range of social services and benefits that many workers would be unable to afford on the market and that the cash-strapped government cannot or will not absorb as more direct expenditures from national welfare and social security budgets.¹⁵

The points of contrast and potential friction between Hong Kong and China in the economic sphere reflect more than matters of ideology or "system type." Differences in levels of development matter as well. Simply put, Hong Kong is a highly

¹⁴ See generally NICHOLAS R. LARDY, FOREIGN TRADE AND ECONOMIC REFORM IN CHINA, 1978-1990 37-104 (1992); Zhonghua Renmin Gongheguo Zhongwai Heze Jingying Qiye Fa [Sino-Foreign Equity Joint Venture Law of the P.R.C.] (1979, amended 1990); Zhonghua Renmin Gongheguo Waize Qiye Fa (1986) [Wholly Foreign-Owned Enterprise Law of the P.R.C.]; Zhonghua Renmin Gongheguo Duiwai Maoyi Fa [Foreign Trade Law of the P.R.C.] (1994).

¹⁵ For extensive discussions of these issues, see, e.g., NAUGHTON, *supra* note 13, at 220-27, 282-83, 289-91, 294-98 (discussing planning and pricing and the gradual progress toward policy of laying off workers and providing unemployment compensation); SUSAN L. SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM 280-308 (1993) (examining sectoral interests and their impact on reform policies and laws); Susan L. Shirk, *The Politics of Industrial Reform*, in THE POLITICAL ECONOMY OF REFORM IN POST-MAO CHINA 195, 204-21 (Elizabeth J. Perry & Christine Wong eds., 1985); Lucy A. Williams & Margaret Y.K. Woo, *The "Worthy Unemployed": Societal Stratification and Unemployment Insurance Programs in China and the United States*, 33 COLUM. J. TRANSNAT'L L. 457, 464-77 (1993).

prosperous and economically advanced urban enclave facing absorption by a still poor and largely rural giant next door. While Hong Kong's per capita income has come to rival that of the industrialized West and Japan, China's remains among the lowest in the world. Typically described as a "newly industrializing country" in the 1970s and 1980s, Hong Kong has begun to move rapidly toward a post-industrial stage, with its local and multinational companies shifting their manufacturing operations beyond the colony's boundaries (largely to Guangdong), and sophisticated service industries now generating a large share of the territory's economic activity (and agriculture virtually none).¹⁶ China's economy, while showing robust growth in commercial, financial, and other services, remains dominated by a shrinking, but still large, agrarian sector and a growing industrial one that is characterized by an unusual combination of small and scattered new enterprises and relatively unreformed state-owned behemoths held over from an earlier era.¹⁷ Reflecting differences in size as well as in levels of economic development, China's economy also remains far less deeply integrated with the global economy (and thus under less pressure to play by its rules) than Hong Kong's is.

Significant legal and institutional consequences follow from such economic facts, principally that the P.R.C. lacks much of what Western-trained business people, lawyers, and government administrators would find familiar in Hong Kong's formal structures and actual practices. Hong Kong prides itself — and sells itself — on its provision of a "rule of law" regime for business and commerce that is the equal or near-equal of any in the world in the transparency of its rules, the neutrality of its courts, the availability of high quality legal advice and representation, and the clarity and completeness of its framework of substantive laws in the shadow of which parties can bargain and assess accurately their prospects for effective legal remedy in the event of non-performance.

Complementing this private law regime is a public law system that most agree does a good job of checking civil service corrup-

¹⁶ See generally Tang Shu-hung, *The Economy*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD 117-150 (Joseph S.Y. Cheng & Sonny H. Lo eds., 1995); Gene Linn, *Manufacturers Promised Modest Revival of Past Glory*, J. COMMERCE, Jan. 30, 1997, at 6A.

¹⁷ See, e.g., NAUGHTON, *supra* note 13, at 330-33; Barry Naughton, *China's Macroeconomy in Transition*, 144 CHINA Q. 1083 (1995).

tion, providing for judicial review of government action, and imposing few regulatory burdens on business. As Hong Kong's boosters hasten to point out, such virtues have made the territory a forum of choice for many complex international transactions that could be undertaken elsewhere, and the hub of the sprawling regional or global operations of truly international corporations that could be located almost anywhere.¹⁸

Unlike Hong Kong, but typical of developing countries, China provides a legal regime for economic actors that remains characterized by, at best, highly uncertain prospects for judicial or other formal enforcement of agreements, a problem that compounds the difficulty created by generally poor information about potential economic partners. Accordingly, a large proportion of business agreements in the still (relatively) undeveloped and newly volatile Chinese economy continue to involve discrete transactions capable of simultaneous performance. Alternatively, longer term arrangements are often restricted to narrow networks in which informal sanctions operate and more reliable indicia of a party's willingness and ability to perform are available.¹⁹ Thus, there is something less than may meet the eye — and much less than one finds in contemporary Hong Kong — in China's recently established contract laws and other economic laws. Although containing much that foreign capitalists find familiar (and some "state interest"-protecting provisions that still give pause), those laws remain shallowly rooted and cast only modest or distorted

¹⁸ See generally MINERS, *supra* note 8, at 95-97 (discussing the Independent Commission Against Corruption); PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 226-312 (1994) (discussing judicial oversight of government activity); Jacques deLisle & Kevin P. Lane, *Cooking the Rice Without Cooking the Goose: The Rule of Law, the Battle over Business, and the Quest for Prosperity in Hong Kong After 1997*, in HONG KONG UNDER CHINESE RULE: THE ECONOMIC AND POLITICAL CONSEQUENCES OF REVERSION (Warren I. Cohen & Li Zhao eds., forthcoming 1997); Y.C. Jao, *Hong Kong's Future as a Free Market Economy*, in HONG KONG: A CHINESE AND INTERNATIONAL CONCERN 205, 205-08 (Jurgen Domes & Yu-ming Shaw eds., 1988) (stressing links between "laissez-faire," rule of law, and Hong Kong's local and global economic success); Fumio Sumiya, *Hong Kong, Singapore Outpace Tokyo as Financial Centers*, THE NIKKEI WEEKLY, Dec. 18, 1995, at 2 (attributing Hong Kong's growth relative to Tokyo as global financial center to the former's less "regulation-bound" market).

¹⁹ See, e.g., DOROTHY SOLINGER, CHINA'S TRANSITION FROM SOCIALISM: STATIST LEGACIES AND MARKET REFORMS, 1980-1990 107-22 (1993); Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face*, 5 J. CHINESE L. 143, 215-41 (1991).

shadows on economic actors' dealings.²⁰

The same can be said about formally upgraded and vastly expanded economic courts that often lack the will and capacity to make and enforce independent judgments that follow the laws' apparent dictates. Reports are legion of courts requiring recalcitrant parties to settle, or judicial tribunals "consulting" local party and government officials. Even the rare occasions when cases do reach a final judgment, and parties secure nominal victories, that still fails to provide effective relief, especially against remote or powerful opposing parties.²¹

The more obviously regulatory or public law face of China's economic law provides a similar study in contrast to Hong Kong's. Whether classified as "state-owned" (*guoying*), "collective" (*jiti*), or "private" (*siying*), and regardless of whether they have assumed corporate (*gongsi*) form, enterprises continue to operate in a legal framework that takes as its premise: that which is not specifically authorized, by law or by license, is forbidden. For substantial enterprises, business licenses typically permit only a narrow scope of operation, and statutes mandate close monitoring by supervisory government departments.²² Taxation rates and other legal rules that are formally of general application fall prey to case-by-case bargaining and exertions of informal power and influence.²³

The same perspective on regulation — and the fertile ground

²⁰ For an example of a "state interest" provision, see *Zhonghua Renmin Gongheguo Jingji Hetong Fa* [Economic Contract Law of the P.R.C.] art. 7(4) (1981, amended 1993) (stating that contracts "in violation of State or public interests" are "invalid"). On the implementation, and limits to implementation, of contract law and contract law norms, see generally David Zweig et al., *Law, Contracts and Economic Modernization: Lessons from the Recent Chinese Rural Reforms*, 23 STAN. J. INT'L L. 319 (1987).

²¹ See, e.g., Donald C. Clarke, *The Execution of Civil Judgments in China*, 141 CHINA Q. 65 (1995); Zweig et al., *supra* note 20, at 361-63.

²² See, e.g., *Zhonghua Renmin Gongheguo Minfa Tongze* [General Principles of Civil Law of the P.R.C.] arts. 42, 49 (1986); *Gongsi Fa*, *supra* note 13, arts. 30, 67, 124-28; *Qiye Fa*, *supra* note 13, arts. 17(vi), 55.

²³ See generally David M. Lampton, *A Plum for a Peach: Bargaining, Interest, and Bureaucratic Politics in China*, in BUREAUCRACY, POLITICS AND DECISION MAKING IN POST-MAO CHINA 33 (David M. Lampton & Kenneth Lieberthal eds., 1992); David Bachman, *Implementing Chinese Tax Policy*, in POLICY IMPLEMENTATION IN POST-MAO CHINA 119 (David M. Lampton ed., 1987). On progress in making taxation less subject to *ad hoc* bargaining, see Tsang Shu-ki & Cheng Yuk-shing, *China's Tax Reforms of 1994*, 34 ASIAN SURV. 769 (1994).

that it creates for unpredictable and sometimes corrupt exercises of discretion in allocating state-rationed opportunities — extends to international trade and investment relations. There, too, a web of laws and regulations requires official approvals or licenses before a foreign-invested enterprise can be established or a Chinese company can seek capital or sell goods abroad. Laws and policies also set limits on the volume of such authorizations, and impose a bewildering array of conditions on granting them. Moreover, despite a commitment during the last several years to “transparency” (*tongmingdu*), complaints have persisted that some of the rules relating to foreign investment have been treated as “internal” (*neibu*), not for circulation to those affected by them.²⁴

The Guangzhou-Shenzhen region, as well as Shanghai and other booming urban areas in the P.R.C., have begun to close the still-wide economic gap with Hong Kong. Yet, as much social scientific theory predicts and as numerous anecdotal accounts suggest, legal and broader institutional change in China has lagged considerably behind the pace of economic transformation. Interpreted as residual Leninism or as political decay, the trend in China is not one that suggests convergence with Hong Kong's regime of minimal but generally effective and non-corrupt institutions and rules for regulating the economy.²⁵ Whatever the economic pressures for China to change in that direction, they remain somewhat blunted and diluted by forces to which China's

²⁴ For general discussions of these issues, see Timothy A. Gelatt, *Legal and Extra-legal Issues in Joint Venture Negotiations*, 1 J. CHINESE L. 217 (1987); Pittman B. Potter, *Foreign Investment Law in the People's Republic of China: Dilemmas of State Control*, 141 CHINA Q. 155 (1995); Bing Wang, *China's New Foreign Trade Law: Analysis and Implications for China's GATT Bid*, 28 J. MARSHALL L. REV. 495 (1995); see also Lori Ioannou, *The Last 400 Days*, INT'L BUS., May 1996, at 50-53 (noting the American Chamber of Commerce in Hong Kong president's criticism of lack of transparency).

²⁵ See generally JAMES A. BILL & ROBERT L. HARDGRAVE, JR., *COMPARATIVE POLITICS* 66-83 (1981) (reviewing theories of “modernization” and “political development”); SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968) (concerning the gap between economic change and political institutional capacity to respond to and manage its consequences); BARRETT L. MCCORMICK, *POLITICAL REFORM IN POST-MAO CHINA: DEMOCRACY AND BUREAUCRACY IN A LENINIST STATE* (1990) (describing the P.R.C. as a still-Leninist system, although one in crisis); Andrew G. Walder, *The Quiet Revolution from Within: Economic Reform as a Source of Political Decline*, in *THE WANING OF THE COMMUNIST STATE: ECONOMIC ORIGINS OF POLITICAL DECLINE IN CHINA AND HUNGARY* 1 (Andrew G. Walder ed., 1995) (pursuing the “decay” thesis).

economically advanced coastal regions remain politically vulnerable, despite their substantial *de jure* and greater *de facto* autonomy. Over a wide range of national legal rules, institutional structures, policy agendas and political habits, the needs, preferences, and interests of China's less developed inland provinces and its economically uncompetitive industries remain major considerations that weigh against the demands and desires of the P.R.C.'s more "Hong Kong-like" regions and sectors.²⁶ In addition, implementing policies to reform and rebuild institutions would face a formidable uphill battle in state and party organs stocked with cadres for whom China's booming economy and crumbling ideology have meant new opportunities to use their powers of office and their access to "inside" information and political favors to advance their own fortunes or those of their friends and family.

2.2. *Politics and Ideology: Fundamental Differences*

Describing Hong Kong as a "first-world city" about to be taken over by a "third-world country," a senior Hong Kong official sought both to sum up the relatively non-ideological aspect of the divide stemming from economic contrasts, and also to evoke the non-economic dimension of the ideological gulf — and related differences in legal and constitutional orders — that separates the territory and its post-1997 sovereign.²⁷ On this political front, the fault lines between systems run not so much between developed and developing or between capitalist and socialist, but, rather, between evolving liberal-democratic on one side and vestigially Marxist-Leninist and corruptly authoritarian on the other.

Colonial Hong Kong's laws and government structures have hardly been models of liberal-democratic ideals. The colonial governor, wielding broad executive and legislative power, has

²⁶ See generally KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 265-67 (1995); NAUGHTON, *supra* note 13, at 184-86; Shirk, *The Politics of Industrial Reform*, *supra* note 15; Irene So, *SEZ in Push for Foreign Capital*, S. CHINA MORNING POST, May 11, 1995, at 8 (describing criticisms of Shenzhen Special Economic Zone for "monopolising economic privileges," and reporting Shenzhen vice-mayor's defense of S.E.Z.'s contributions). The Ninth Five Year Plan (currently in effect) commits the state to foster more rapid development of the inland areas that have lagged far behind coastal provinces in China's reform-era boom.

²⁷ Interview with Anonymous Senior Hong Kong Government Official, in Hong Kong (July, 1996).

always been appointed from London, without local input from Hong Kong. A Legislative Council ("Legco"), limited to largely consultative functions and veto powers over some purely local laws, had been selected exclusively by gubernatorial appointment until recent years. The legislative powers of Hong Kong's colonial government as a whole have been modest as well, defined and limited by British laws that are beyond Hong Kong's ability to alter. In the waning days of British rule, Hong Kong's laws still permitted considerable press censorship, administrative detention, suppression of political organizations, and tight restrictions on political rallies. In addition, the colonial government's record of staying within those modest legal limits was not spotless. Moreover, and more diffusely, much of the real political power in the colony was exercised informally by or on behalf of economic elites.²⁸

Nonetheless, especially in recent years, there has been much that proponents of liberal and democratic ideologies could find appealing in Hong Kong. In the wake of the Beijing regime's violent suppression of the 1989 Democracy Movement on the mainland, the Hong Kong government adopted a Bill of Rights Ordinance embracing basic civil and political liberties, mandating rights-protecting rules of statutory construction, and prompting amendment or judicial invalidation of existing legislation to bring Hong Kong's laws in line with liberal standards, including those set forth in the United Nations Convention on Civil and Political Rights.²⁹ Popular elections, introduced for local urban council and district council posts in the 1970s, became contested, multi-party affairs and reached up to the Legco level in the 1990s, with fully two-thirds or more of the sixty seats in the Legco elected in 1995 being filled — directly or indirectly — on the basis of a

²⁸ On these issues, see generally, MINERS, *supra* note 8, at 53-84, 114-27; IAN SCOTT, POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG 59-60, 248-49 (1987); WESLEY-SMITH, *supra* note 18, at 23-50, 108-25, 171-213; Ming K. Chan, *The Imperfect Legacy: Defects in the British Legal System in Colonial Hong Kong*, 18 U. PA. J. INT'L ECON. L. 133 (1997); Nihal Jayawickrama, *Protecting Civil Liberties, in THE FUTURE OF THE LAW IN HONG KONG* 148 (Raymond Wacks ed., 1989).

²⁹ Hong Kong Bill of Rights Ordinance, Hong Kong Ordinance, chap. 383 (1991); Societies Ordinance, Hong Kong Ordinances, chap. 151 (amended 1992); Public Order Ordinance, Hong Kong Ordinances, chap. 245 (amended 1995).

broad suffrage.³⁰

Moreover, Legco's role and visibility in the colony's government increased, especially during the 1990s when Governor Christopher Patten submitted for its consideration key bills on electoral reform and the establishment of a Court of Final Appeal. The profile-raising effect for Legco proved greater still when both of these bills prompted contentious debate, and the expression of considerable opposition to the government's positions from across the spectrum of democrats, independents, business conservatives, and pro-China members.

Apart from the recent and still-limited democratization and augmented critical roles of Hong Kong's quasi-legislative organ, a variety of institutions have long provided a considerable degree of government accountability and limits to abuses of governmental power. These principally include the Independent Commission Against Corruption (established in 1975), the "pre-reform" Legco itself, and a judiciary empowered to hear challenges to government actions, imbued with a strong sense of independence, and ultimately subject to review by the Privy Council in London — a body subject to no direct or significant influence from the colonial government. In recent years, some of the territory's emergent cadre of liberal and pro-democracy politicians have argued that Britain's Parliament has provided a modest sort of vicarious democracy for Hong Kong, assuring that popularly elected representatives (albeit ones in London and not chosen by a Hong Kong electorate) oversee and call to account the appointed officials charged with administering Hong Kong's affairs.³¹

In these areas, the People's Republic remains, in theory and practice, a profoundly different system. Much has changed since the era of Mao Zedong. The 1982 state constitution declares the Chinese Communist Party to be subject to the law, and provides a laundry list of liberal civil and political rights for citizens.³²

³⁰ Legislative Council (Electoral Provisions) Ordinance, Hong Kong Ordinances, chap. 381 (1995). For more detailed descriptions of the Patten reforms, see MINERS, *supra* note 8, at 116, 128a; Lo Chi-kin, *From Through Train to Second Stove*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD, *supra* note 16, at 25, 28.

³¹ For a discussion on the latter point, see Martin Lee, *Need for "Rule of Law"*, S. CHINA MORNING POST, Aug. 1, 1993, at 11.

³² Zhonghua Renmin Gongheguo Xianfa [Constitution of the P.R.C.] arts. 5, 33-50 [hereinafter Xianfa].

Genuinely contested direct elections have been held at the village level in some areas at some times. At more elite levels, nominally democratic organs have rejected a handful of the most unpopular second-tier members of powerful factions in the leadership as candidates for membership in key Party and state organs.³³ The Administrative Litigation Law has afforded citizens an unprecedented and sometimes fruitful avenue for challenging in court instances of overreaching and abuse by state actors. Some prominent officials and their relatives have faced prosecution for corruption. And the Party's and the government's internal disciplinary proceedings have offered a significant means for bringing some errant party and state functionaries to heel.³⁴

Still, China's political and constitutional order remains officially Leninist, strongly authoritarian, and, accordingly, short on citizen-initiated remedies against state and quasi-state actors. The state constitution and Party ideology enshrine the leadership of the Communist Party, the socialist road, Marxism-Leninism Mao Zedong Thought, and the People's democratic dictatorship as "basic principles" (*jiben yuanze*). The constitution also makes citizens' enjoyment of its individual rights provisions subordinate to the interests of the state and contingent on citizens' performance of a rather extensive set of constitutionally imposed

³³ See, e.g., Yan Jiaqi, *The Nature of Chinese Authoritarianism*, in DECISION-MAKING IN DENG'S CHINA 3, 10 (Carol Lee Hamrin & Suisheng Zhao eds., 1995); RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING 215-18, 364 (1994) (concerning more elite level developments); ANDREW J. NATHAN, CHINESE DEMOCRACY 193-232 (1985) (concerning local elections of 1980); Trudy Rubin, *A Sign That China's Long March to Democracy May Have Begun*, SACRAMENTO BEE, Jan. 12, 1997, at F2 (discussing more recent local elections).

³⁴ See generally Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Litigation Law of the P.R.C.] (1989); HSI-SHENG CH'I, POLITICS OF DISILLUSIONMENT 17-225 (1991) (describing intra-Party "rectification campaigns" of the 1980s); Alison E.W. Connor, *Anticorruption Legislation*, 11 E. ASIAN EXEC. REP. 8 (Jan. 15, 1989); Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the P.R.C.*, 3 J. CHINESE L. 1 (1989); *Beijing Mayor Pledges Result in Chen Xitong Case*, AGENCE FRANCE PRESSE, Dec. 23, 1996 (describing the corruption scandal leading to fall of Beijing Party chief, the suicide of the deputy mayor, and the new anti-corruption drive); *China Iron and Steel Boss Quits, Son Arrested on Corruption Charges*, AGENCE FRANCE PRESSE, Feb. 18, 1995 (describing the bribery scandal at Shougang, a huge and "model" state enterprise, and the arrest, leading to conviction and a suspended death sentence, for son of company chairman).

duties.³⁵ By all unofficial accounts (and some official ones), socialist democracy and enjoyment of liberal-sounding rights in practice fall short of what the constitution appears to promise.³⁶ Little in the way of popular control or meaningful accountability flows from nominally representative legislatures, the presence of alternative political parties, formal procedures for electing legislative and executive officials, or administrative law's narrowly cabined promise of judicial redress (one that does not permit challenges to the Party's actions, to the validity of underlying regulations or statutes that formally authorize concrete state actions, or to concrete actions formally authorized by invalid regulations and statutes).³⁷

The most potent mechanisms for holding power-holders accountable, and providing citizens with redress or vindicating their rights, remain remarkably informal, *ad hoc*, and ultimately dependent on the discretionary action of those who wield power within Party-dominated structures. Hope for a remedy often depends on journalistic exposes that attract the leadership's attention, or periodic Party-led campaigns that are extra-legal in form and, arguably, anti-legal in spirit. Relief often requires intervention by powerful individuals who sometimes hold formally important positions in the Party and state hierarchies, and who act to enforce official norms (albeit somewhat selectively against political opponents or rival factions).³⁸ As this suggests,

³⁵ See Xianfa, *supra* note 32, pmbl., arts. 33, 51-54; Deng Xiaoping, *Uphold the Four Cardinal Principles*, in *SELECTED WORKS OF DENG XIAOPING* 166-91 (1984).

³⁶ See, e.g., AMNESTY INTERNATIONAL, *CONTINUED PATTERNS OF HUMAN RIGHTS VIOLATIONS IN CHINA* (1992); United States Dept. of State, *Human Rights Country Reports: China* (1996) (on file with author). But see Guowuyuan Xinwen Zhu, *Zhongguo de Renquan Zhuangkuang* [State Council Information Office, "White Paper" on Human Rights in China] (1991); *Zhu Muzhi Addresses Human Rights*, *BEIJING REV.*, Feb. 17-Mar. 2, 1997, at 11.

³⁷ On the formal limitations of the Administrative Litigation Law, see Pittman B. Potter, *The Administrative Litigation Law of the P.R.C.: Judicial Review and Bureaucratic Reform*, in *DOMESTIC LAW REFORMS IN POST-MAO CHINA* 270 (Pittman B. Potter ed., 1994).

³⁸ See *supra* note 34; CHINA SINCE TIANANMEN: POLITICAL AND ECONOMIC CONFLICTS 101-106 (Lawrence R. Sullivan ed., 1995) (concerning anti-corruption campaigns); LIU BINYAN, *PEOPLE OR MONSTERS?* (1983) (providing examples of reportage); MCCORMICK, *supra* note 25, at 104-13, 157-90 (concerning anti-crime campaigns and "rectification" drives inside the Party); POLICY CONFLICTS IN POST-MAO CHINA 102-14 (John P. Burns & Stanley Rosen eds., 1986) (concerning "letters and visits" method of citizen-initiated

the persisting weakness or worsening decay of formal institutions and procedures in China's authoritarian politics and government has made corruption — in the broad sense of departing from or adhering to official norms for illegitimate reasons, and in the narrow sense of influence-peddling — both a key means, and a major impediment, to achieving compliance with the demands of law and official policy. And, more broadly, the making of law and policy has remained profoundly influenced by informal processes, networks, and sources of power that only loosely track, and frequently cut across, legal and constitutional structures.

2.3. *Legal Systems: Different "Types"*

Finally, the legal systems of Hong Kong and the P.R.C. stand on opposite sides of a basic divide as well, one that is only partially attributable to differences in economic and political institutions, ideologies, or levels of economic development. Typologically, the P.R.C. is a member of the civil law family, an indirect heir to a Franco-German tradition received into China via Japan and the Soviet Union. In contrast, Hong Kong is part of the common law world, rooted in England and having spread throughout much of the former British empire. To be sure, the dichotomy between the two types of legal systems is vulnerable to oversimplification and, hence, to overstatement. The civil law system is too easily and too often described as one in which the decision of cases (and a minimal judicial articulation of legal rules) turns on exegeses of code texts undertaken by a judiciary rather similar in structure and ethos to other government bureaucracies. The common law system is too facilely contrasted as one in which judge-made law and diffuse extra-legislative norms dominate, and the process of adjudication (most strikingly in cases involving the review of legislative and other governmental action) is the province of highly "independent" or even "unaccountable" courts that are, in spirit and sometimes in formal powers, a sharply distinct "third branch."³⁹

Nonetheless, the conventional dichotomy between common law and civil law does point to some salient differences between

investigation of official misconduct).

³⁹ For a general discussion of the contrasts between the two systems, see the materials collected in *COMPARATIVE LEGAL TRADITIONS* 65-129, 455-537 (Mary Ann Glendon et al. eds., 2d ed. 1994).

the variants of the two great legal families that have developed — amid considerable differences in economic and political systems — on opposite sides of the P.R.C.-Hong Kong border. Two controversies of the transitional period illustrate the point.

First, some Hong Kong lawyers and pro-democracy politicians — most notably Legco member, Democratic Party leader, and prominent barrister Martin Lee⁴⁰ — have voiced the fear that China will force an expansion of Hong Kong's "act of state" doctrine to insulate many tortious or commercial actions of Chinese state-owned enterprises and government actions from review and redress in S.A.R. courts.⁴¹ The territory's politically engaged lawyers and legally aware politicians generally agree that the existing judge-made "act of state" and related doctrines, which preclude judicial review of questions involving such quintessential sovereign acts as the exercise of powers committed to the discretion of a political branch by the constitution or by legislation (as well as matters involving the exercise of core foreign affairs functions), constitute a well-articulated and fairly narrow principle in the common law system to which Hong Kong subscribes. They see the present doctrine as posing no dire threat to the courts' role in preserving principles of government under law.⁴² What the more vocally skeptical among their number fear is that a much broader definition will be read into the relevant text of the Basic Law (the S.A.R.'s mini-constitution enacted by the P.R.C.'s National People's Congress ("NPC")) and the Court of Final Appeal Ordinance (a 1995 local Hong Kong law that belatedly — and controversially — implemented a Sino-British deal first struck in 1991). Both of these laws provide, in language that critics see as ominously ambiguous, that S.A.R. courts shall have no jurisdiction over "acts of state *such as* foreign affairs and

⁴⁰ Martin Lee is the Chairman of the Democratic Party and one of the most outspoken advocates for democracy in Hong Kong. On the "act of state" question, Lee has disagreed with many of his usual political allies, who have taken a more sanguine view.

⁴¹ See, e.g., Louise do Rosario, *Future Imperfect*, FAR E. ECON. REV., Aug. 10, 1995, at 27 (citing views of Martin Lee and legal academic Raymond Wacks); *Clauses Raise Worries on Human Rights After '97*, S. CHINA MORNING POST, July 27, 1995, at 5.

⁴² Interviews with Anonymous Hong Kong Barristers and Government Lawyers, in Hong Kong (July, 1996); see generally WESLEY-SMITH, *supra* note 18, at 91-92 (concerning "act of state" doctrines applicable in colonial Hong Kong law).

defense" (*guofang, waijiao deng guojia xingwei*).⁴³

While the issue of how broadly to insulate the Chinese state and its instrumentalities from review in Hong Kong's courts is in large part one of presumed political differences over the desirable extent of government accountability, the civil law-common law divide matters as well. Those in Hong Kong who openly worry about an expansion of the act of state doctrine assume that a P.R.C.-style civil law approach will be pursued to serve the Beijing authorities' substantive ends: China will insist upon, or undertake directly, an interpretation — perhaps a legislative one — of the vague statutory clause. This formally unobjectionable civil law process, China will presumably claim, is free legitimately to ignore established common law doctrine, as well as the underlying common law conventions supporting judicial authority to hear cases and provide redress against the government and the entities it owns or controls. Those in Hong Kong who favor the current doctrine, but say they do not see very much cause for alarm in the statutory provisions, argue or assume that common law doctrine — and the broader notion of courts' roles that support that doctrine — will be allowed to carry forward relatively unscathed, as promised in the Joint Declaration.⁴⁴

Second, and more broadly, a long-running controversy over the prospects for the "independent judicial power" (*duli de sifaquan*) promised as part of the S.A.R.'s "high degree of autonomy" (*gaodu zizhi*) has had a similar structure.⁴⁵ Much of the concern that critics and skeptics express derives from a sense that, as a matter of substantive political ideology and institutional

⁴³ Basic Law, *supra* note 4, art. 19 (emphasis added); Court of Final Appeal Ordinance, Hong Kong Ordinances, chap. 484; *Court of Final Appeal: The Text in Full*, S. CHINA MORNING POST, June 10, 1995, at 2 (providing the text of the Sino-British Joint Liaison Group Agreement on C.F.A.); cf. Joint Declaration, *supra* note 1, annex I, § I (stating that "foreign and defense affairs are the responsibility of the Central People's Government" and thus not within the "executive, legislative and independent judicial power" of the S.A.R.).

⁴⁴ For examples of both sorts of arguments — that the Court Ordinance invites arbitrary interpretation by the NPC Standing Committee and thus invites a step-by-step erosion of the rule of law through legislative interpretation, and, on the other side, that the pledge to preserve the common law adequately insures continuation of a narrow act of state doctrine — see *Clauses Raise Worries on Human Rights*, *supra* note 41, at 5; Robin Fitzsimons, *Is Hong Kong Facing a Legal Sell-Out?*, TIMES (London), Aug. 1, 1995.

⁴⁵ Basic Law, *supra* note 4, arts. 2, 19; Joint Declaration, *supra* note 1, paras. 3(2), 3(3).

practice, China is weakly committed to the rule of law in any form or to accepting "genuine" or "meaningful" autonomy for the S.A.R. in any sphere. But their fears are also compounded by the P.R.C.-Hong Kong version of the split between civil law and common law systems. On this view, part of the danger stems from China's embrace of a legal-structural principle of legislative supremacy (assumedly for reasons with obvious appeal to Leninists and authoritarians where, as in China, the top leadership's ability to control law-makers is secure). Chinese legal theory in general provides for courts' formal subordination to the legislature and mandates their obedience to legislative interpretations of laws. The Basic Law extends this approach to the Hong Kong S.A.R., specifically granting the NPC's Standing Committee ultimate power to "interpret" (*jieshi*) the Basic Law (in consultation with its Basic Law Committee), and preserving the NPC's authority to "amend" (*xiugai*) the Basic Law.⁴⁶

Although orthodox (if not strictly necessary) in a civil law system, the structural doctrine of legislative supremacy, especially in China's formulation, seems to be in serious tension with Hong Kong's particular common law tradition of an independent judiciary. Indeed, Hong Kong's tradition of strong judicial independence, combined with the lack of accountability of the highest court for the territory (the Privy Council in London) to any Hong Kong governmental body, arguably approach the U.S. model more nearly than does the U.K.'s system of parliamentary supremacy checked by unwritten constitutional principles.

2.4. *The Institutional Solution*

Through years of negotiation and conflict, China, Britain and a variety of forces in Hong Kong have crafted an unusually extensive structure for bringing these seemingly antithetical economic, political, and legal systems within the legal and institutional structure of a single sovereign state. The Joint Declaration, the Basic Law, and several supplementary laws, policies, and agreements collectively sketch — to the partial satisfaction of some and the alarm of others — a framework pledging integration without radical transformation. They provide that Hong Kong is to exercise a high degree of legislative

⁴⁶ Basic Law, *supra* note 4, arts. 158, 159; Xianfa, *supra* note 32, arts. 62, 67, 128.

autonomy through a S.A.R. legislature that was once to be composed of representatives riding a "through train" from membership in the last colonial Legco, that is now initially to be a "Provisional Legislature" stocked by legislators named by a P.R.C.-chosen Selection Committee, and that in later iterations is to be elected, ultimately by universal suffrage.⁴⁷

Similarly, the executive power accorded to the S.A.R. is to be wielded by an administration staffed by a local civil service, and headed by a P.R.C.-appointed Chief Executive, with the first occupant of that office (already) nominated by the same committee that has more recently selected the Provisional Legislature, and later incumbents selected by democratic elections.⁴⁸ The arrangements for the legal system promise that the "laws in force in Hong Kong" and various United Nations-recognized human rights principles will remain in force, that the territory's common law system will persist, and that an independent judiciary, appointed by the Chief Executive and headed by a collegial Court of Final Appeal (potentially with one expatriate member from another common law jurisdiction), will interpret those laws and exercise the S.A.R.'s "high degree of judicial autonomy."⁴⁹

The same bundle of international agreements, national and local laws, and less formal arrangements also mandates limits to autonomy and demands a considerable degree of integration. For example, the S.A.R. is declared to be non-derogably part of a unitary Chinese state. Further, its autonomous powers and local laws are limited by their dependence on the NPC's affirmative delegation of law-making authority, their vulnerability to reversal by NPC action (either legislative or interpretive), and the affirmative obligation of the S.A.R. legislature to enact several laws mandated by the Basic Law. Moreover, the Chief Executive is appointed formally (and in practice, if the selection of the

⁴⁷ Basic Law, *supra* note 4, arts. 2, 66-79, Annex II; Joint Declaration, *supra* note 1, paras. 3(2), 3(3), annex I, § II; Quanguo Renmin Daibiao Dahui Guanyu Xiangang Tebie Xingzheng Qu Diyi Ju Zhengfu he Lifahui Chansheng Banfa de Jueding [Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong S.A.R.] (1990) [hereinafter NPC Decision].

⁴⁸ Basic Law, *supra* note 4, arts. 43-65, annex I; Joint Declaration, *supra* note 1, para. 3(4), annex I, § I; NPC Decision, *supra* note 47.

⁴⁹ Basic Law, *supra* note 4, arts. 2, 8, 39, 80-96; Joint Declaration, *supra* note 1, paras. 3(3), 34, annex I, §§ II, III, XIII; Bill of Rights Ordinance, *supra* note 29; Court of Final Appeal Ordinance, *supra* note 43.

office's first occupant is indicative) by Beijing, and remains legally "accountable" to the Central People's Government. Additionally, the power to interpret and amend the Basic Law is vested in the NPC and its Standing Committee. Finally, matters requiring interpretation of provisions governing the relationship between the S.A.R. and the Central People's Government are, like acts of state, explicitly beyond the independent powers of S.A.R. courts.⁵⁰

Whether this ambitious and elaborate, yet ambivalent and ambiguous, package of legal and institutional measures will work to accommodate the two systems' striking differences — whether it will provide a mechanism for effecting a transformation from colony to S.A.R. that is compatible with the Chinese leadership's interpretation of the requirements of sovereignty and that also delivers on the promises of continuity and autonomy that people indispensable to Hong Kong's continuing success require — is a question the answer to which may lie in what happens during the period of final, formal transition.

On one hand, no certain and widely convincing answer appears possible before the date of the handover. That much is evident from the heated and polarized debates about the bleakness or brightness of the territory's future that have persisted up to the eve of formal reversion and well after the formal legal and institutional arrangements for the S.A.R. have been laid down. Thus, for example, the colonial government has insisted that the 1995 Court of Final Appeal Law adequately preserves the rule of law that has made Hong Kong special. Numerous voices from the business community express unbridled confidence in the territory's future under S.A.R. institutions and point to Hong Kong's continued robust economic health as support for their sanguine views. At the same time, the Hong Kong government's erstwhile allies in the late colonial democratization process have denounced the deal on the court as an irredeemable betrayal of the rule of law, and point to the flight of some of Hong Kong's most

⁵⁰ See Basic Law, *supra* note 4, pmb, art. 1 (concerning sovereignty), arts. 2, 17, 18, 23, 39 (concerning S.A.R. legislative authority and obligations), arts. 15, 43 (concerning Chief Executive), arts. 158, 159 (concerning interpretation and amendment), arts. 19, 158 (concerning judicial authority); Joint Declaration, *supra* note 1, para. 1; NPC Decision, *supra* note 47 (concerning Chief Executive); Court of Final Appeal Ordinance, *supra* note 43 (concerning judicial authority).

venerable companies to seek listings in the Cayman Islands, Bermuda, or Singapore as evidence of the legislation's inadequacy.⁵¹

On the other hand, and notwithstanding confident assertions — both pessimistic and optimistic — that the die has already been cast and the outcome is foreseeable, a palpable air of anticipation still surrounds July 1, 1997, even for partisans who claim a high degree of prescience.⁵² That mood is surely rooted in a broad sense that the real test of the legal, institutional, and constitutional arrangements that have emerged from more than a decade of multilateral bargaining and conflict will not come until after Hong Kong's colonial authorities depart. The plausible assumption is that, faced with the force of events and the inescapable demands of making concrete decisions concerning politics, law, and governance for the territory, those ruling post-reversion Hong Kong will have to reveal what the formally prescribed norms, rules, and structures of the S.A.R. will mean in practice, and they will have to do so in the immediate wake of the handback.

On this view, then, a relatively brief period of Central People's Government-S.A.R. interaction, and S.A.R. practice, following the handover will tell us a great deal about whether the vital alchemical formula for "one country, two systems" will likely yield an unprecedented and impressive synthesis, a base metal, or perhaps even a catastrophic explosion. From a perspective that thus focuses on apparent antinomies between the established ways of the territory and those of its future master, and sees the proffered institutional fixes as a principal — if possibly inadequate — mechanism for resolving them, July 1, 1997, does promise to be something much more than a time of only formal and symbolic transformation, or a mere milepost in a protracted transition.

⁵¹ See generally on this debate, deLisle & Lane, *supra* note 18; William Dowell, *Hong Kong 1997*, 18 U. PA. J. INT'L ECON. L. 61 (1997) (taking a more pessimistic position); Anthony Neoh, *Financial Legal Institutions in Hong Kong's Transition*, 18 U. PA. J. INT'L ECON. L. 31 (1997) (siding with more optimistic views).

⁵² One rough indicator of this level of anticipation is the flood of articles and editorials in the Hong Kong press that seek to predict or explain Hong Kong's post-1997 future. In an index of the territory's major dailies, entries under the heading "the question of the future" (*quantu wenti*) run to the thousands. See Xiangang Baozhi Jianbao Mulu (Index of Clippings from Hong Kong Newspapers) (on file with author).

3. THE LONG TRANSITION: CONVERGENCE, INTEGRATION, AND THE IRRELEVANCE OF NEW INSTITUTIONS

From a perspective that focuses on less starkly contrasting aspects of eve-of-reversion Hong Kong and China, and that sees less riding on the implementation of formal legal and institutional arrangements for the S.A.R., July 1, 1997, appears likely to be a date of relatively modest significance in the colony's reintegration with the motherland, one not warranting the attention that will surely mark its arrival. On this view, the nominal transfer of authority is but one moment in a long transition that began two decades ago, that will require less change than many imagine, and that can be expected to continue well beyond the turn of the century.

In many aspects of Hong Kong's economic, political, and legal life, 1997 is already here, and has been for some time. In other respects, we likely will not know what 1997 means for Hong Kong for a decade or more.

3.1. *Economics: Integration and Similarity*

For much of its time as a British colony, Hong Kong has been economically dependent on the mainland as its indispensable source of water, food, electricity, and (in the form of migrants and refugees) labor power. With the creation of the Shenzhen Special Economic Zone on Hong Kong's border and the P.R.C.'s broader post-Mao embrace of policies to welcome foreign capital and to expand China's engagement in international commerce, Hong Kong's economic relationship with its neighbor began to undergo major transformation even before the commencement in 1982 of the Sino-British negotiations that ultimately produced the Joint Declaration. Throughout the 1980s and 1990s, Hong Kong has been the single largest source of, and platform for, the burgeoning flows of foreign investment to the People's Republic and especially to Guangdong, the province neighboring Hong Kong. By most estimates, Hong Kong accounts for over half of foreign direct investment in the P.R.C. today. Hong Kong companies, often ones quite modest in size, have been the foreign partners in the lion's share of joint-ventures and other foreign-invested enterpris-

es.⁵³ In the 1990s, major mainland companies began to be listed on the Hong Kong Stock Exchange (in the so-called "H-share" market, which supplemented the domestically issued "A-shares" and "B-shares" and, for a few select state-owned companies, "N-shares" sold, respectively, to P.R.C. citizens, foreigners — including Hong Kong "compatriots" — in China, and investors on the New York Stock Exchange).⁵⁴

The pattern in foreign trade has been similar. More than half of China's imports and exports go through Hong Kong. Much of this trade is in the form of re-exports to China from other countries or from other countries to China, making Hong Kong China's vital gateway to the world. On its own account, Hong Kong consistently ranks among the P.R.C.'s top two or three trading partners.⁵⁵

Such developments have meant a striking reconfiguration of Hong Kong's economic identity, bringing a rapid integration of the colony's economy with China's, and especially southeastern coastal China's, economy. By some estimates, as much as one-third of the territory's GDP is now attributable to "the China factor."⁵⁶

As this suggests, the reform era P.R.C. has become a principal venue for Hong Kong-based investment as well. Many of Hong Kong's manufacturing concerns have become transborder

⁵³ See, e.g., Hong Kong Government Trade Department, *China and Hong Kong: Some Important Facts* (visited Mar. 31, 1997) <<http://www.info.gov.hk>>; *People's Republic of China: February 1997*, QUEST ECON. DATA BASE, NAT'L WESTMINSTER COUNTRY BRIEFS (1997); Bryan Batson, *People, Politics and Profits*, CHINA BUS. REV., Nov.-Dec. 1996, at 38-41; Ioannou, *supra* note 24, at 50; Kathleen Kearney, *Deng's Open Door Policy Led HK into China*, Reuters, Feb. 21, 1997; *Confidence in 1997 Handover Rising in HK*, Xinhua News Agency, Dec. 30, 1996; see also Yin-wing Sung, *Economic Integration of Hong Kong and Guangdong in the 1990s*, in *PASSAGE TO CHINESE SOVEREIGNTY: A HONG KONG READER* 182 (Ming K. Chan & Gerald Postiglione eds., 1996). On earlier periods, see A. G. YOUNGSON, *CHINA-HONG KONG: THE ECONOMIC NEXUS* (1983).

⁵⁴ For general accounts of this system, see Robert Art & Minkang Gu, *China Incorporated: The First Corporation Law of the P.R.C.*, 20 YALE J. INT'L L. 273, 300-05 (1995); Andrew Xuefeng Qian, *Riding Two Horses: Corporatizing Enterprises and the Emerging Securities Regulatory Regime in China*, 12 UCLA PACIFIC BASIN L. REV. 62, 85-96 (1993).

⁵⁵ See, e.g., Tang, *The Economy*, *supra* note 16, at 133-34; NATIONAL WESTMINSTER COUNTRY BRIEFS, *supra* note 53; Sarah Davidson, *Hong Kong Trade Gap Widens as Exports Plunge*, Reuters, July 26, 1996.

⁵⁶ See Tang, *The Economy*, *supra* note 16, at 133.

enterprises with front offices in the territory and factories in Guangdong, thus exploiting newly available opportunities to specialize along obvious lines of comparative advantage.⁵⁷ Some of Hong Kong's most prominent tycoons and their companies have made infrastructure construction, property development and other ventures in the P.R.C. a substantial part of their business, with a few of the more prominent examples including Li Ka-shing's Cheung-Kong Holdings venturing into commercial and residential real estate projects in Beijing and Shanghai, and Gordon Wu's Hopewell Holdings undertaking a Guangdong-Hong Kong highway and several power projects.⁵⁸ During the 1980s and 1990s, China business also came to be a principal *raison d'être* for the Hong Kong offices of multinational corporations and international banks, consulting firms, and law firms. Recent surveys have found that there are thousands of foreign firms with regional headquarters or offices in Hong Kong, and that more than half of U.S. firms cite the China market as their major reason for their presence in the territory.⁵⁹

In addition to these developments on the investment side, China has become Hong Kong's top trading partner by nearly all measures. It is the primary source of, and destination for, re-exports passing through the territory. And the largest share of Hong Kong's exports now go to, and its imports come from, the P.R.C.⁶⁰

As the trade figures suggest, and especially in more recent years, the road to economic integration has been a two-way street. Large and influential Chinese state enterprises, some under direct

⁵⁷ See, e.g., Kearney, *supra* note 53 (quoting the dean of a Hong Kong university's business school); see generally, Sung, *supra* note 53, at 203-05.

⁵⁸ See, e.g., Carl Goldstein, *Property: Building for a Billion*, FAR E. ECON. REV., July 16, 1992, at 41-42; Paul Handley, *The Woes of Gordon Wu*, INSTITUTIONAL INVESTOR, Jan. 1996, at 115.

⁵⁹ See, e.g., *American Firms Cherish Full Confidence in China and Hong Kong Markets*, Xinhua News Agency, June 22, 1993 (reporting on survey by American Chamber of Commerce in Hong Kong); *HK Becomes Regional Center in Asia/Pacific*, Xinhua News Agency, Dec. 20, 1995, in BBC, *Survey of World Broadcasts*, available in LEXIS, Asiapc Library, Allasi File.

⁶⁰ See, e.g., Leonard K. Cheng, *Trade and Industry: 1997 and Beyond*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD 175, 176-81 (Joseph S. Cheng & Sonny S.H. Lo eds., 1995); P.T. Bangsberg, *Census Report: Re-exports Continue to Dominate Hong Kong's Trade*, J. COMMERCE, Feb. 25, 1997, at 5A; Hong Kong Government Trade Department, *Economic and Trade Information on Hong Kong* (visited Mar. 31, 1997) <<http://www.info.gov.hk>>.

central government control, have moved to acquire significant stakes in the territory's businesses. Particularly high-profile examples include the acquisition by an arm of the P.R.C.'s China International Trade and Investment Corporation (CITIC Pacific) of substantial shares in key Hong Kong utilities and its flagship airline (whose parent company, Swire, is one of the territory's two most venerable *hong*), and the establishment of T.T. Tsui's New China Hong Kong Group as a vehicle for state-owned and well-connected P.R.C. enterprises to join with prominent Hong Kong players to invest in Hong Kong and mainland business opportunities.⁶¹ More broadly, a rumored central directive in 1995 told Chinese state-owned companies to increase their holdings in Hong Kong entities.⁶² By some estimates, the P.R.C. has become the third largest source of foreign direct investment in Hong Kong, accounting for perhaps tens of billions of dollars in capital inflows.⁶³

In recent years, new business structures and vehicles have arisen to manage, and to extend, the increasingly complex economic entanglement between the two economies. Consortia like the New China Hong Kong Group, and H-share listings by state-owned enterprises, are some of the more simple examples. Others include so-called "red chip" companies, an informal elite subset of companies listed on non-P.R.C. exchanges and controlled by powerful Chinese state entities. Somewhat more exotic techniques are also used, such as "backdoor listings," in which P.R.C.-controlled enterprises take over preexisting Hong Kong companies, merge or transfer assets, and thereby gain access to the capital markets available to Hong Kong-listed companies. Another alternative involves new or reorganized Hong Kong companies structured to hold shares in mainland enterprises, and thus to offer the wary investor a way of investing in China without having to deal directly with P.R.C. companies, laws, and

⁶¹ See, e.g., *The Chinese Takeover of Hong Kong, Inc.*, ECONOMIST, May 7, 1994, at 35-36; Catherine Field, *The Selling of a Grand Old Airline*, WORLD BUSINESS, July/Aug. 1996, at 12; Jonathan Karp, *The New Insiders*, FAR E. ECON. REV., May 27, 1993, at 62.

⁶² See, e.g., Bruce Gilley, *Great Leap Southward*, FAR E. ECON. REV., Nov. 23, 1995; Bruce Gilley, *Here Come the Jitters*, FAR E. ECON. REV., Apr. 25, 1996, at 54.

⁶³ See, e.g., Kearney, *supra* note 53; Wang Xiangwei, *Turning a Deeper Shade of Red*, S. CHINA MORNING POST, Feb. 2, 1997, at 2.

regulators.⁶⁴

As some participants and observers see it, such concrete economic changes have brought greater harmonization of business and legal cultures in Hong Kong and China, primarily through Hong Kong's transition toward a Chinese model. Although the accuracy of this perception is nearly impossible to verify, its existence is amply reflected in a journalistic and popular obsession with gauging who in Hong Kong business circles is well-connected with the territory's future masters, and in moves by some prominent Hong Kong companies and business organizations to replace expatriate executives with locals assumed to have better "connections" (*guanxi*) with those who will be in a position to award lucrative contracts, dispense governmental largesse, grant favors, and impose burdens after 1997. In the more mundane and better established business of pursuing small-scale joint ventures and the like in the P.R.C., conventional wisdom and patterns of investment suggest that capital has flowed along the lines of long-standing informal ties — typically back to the Hong Kong investor's home village or county, where superior access to information and the availability of informal norms of behavior and mechanisms of enforcement can make up for an inability or unwillingness to rely primarily on written contracts and a threat of judicial enforcement.⁶⁵

Moreover, there is something to be said for the position that the supposed "sinicization" of Hong Kong's business and business-

⁶⁴ See, e.g., *Hong Kong Shares: Red Chips Today, Blues Tomorrow*, ECONOMIST, June 26, 1993, at 83; *Red Chips: The Preferred Vehicle*, ASIA MONEY, Dec. 1996-Jan. 1997, at 43; Gary Silverman, *Miracle Man*, FAR E. ECON. REV., Jan. 16, 1997, at 58 (concerning Li Ka-shing's restructuring of his holding companies, affecting interests of investors seeking a conduit for indirect China investments).

⁶⁵ See, e.g., EZRA F. VOGEL, ONE STEP AHEAD IN CHINA: GUANGDONG UNDER REFORM 60-69 (1989) (describing Hong Kong-Guangdong investment ties and economic integration in reform era, including significance of informal relationships and information access); Sung, *supra* note 53, at 186-88, 205-07; Louis Kraar, *Larry Yung: The Man to Know in Hong Kong*, FORTUNE, Jan. 13, 1997, at 102-06 (describing the rise and central role of the head of CITIC Pacific, the P.R.C. owned Hong Kong company, on the eve of reversion); *Preparing for China*, ECONOMIST, Jan. 11, 1997, at 58-59 (discussing leading Hong Kong businessman Li Ka-shing's P.R.C. connections and his maneuverings in anticipation of 1997); see also Mark Sharp, *Warning for Deng Related Firms*, S. CHINA MORNING POST, Mar. 23, 1997, at 5 (describing views held in China and Hong Kong that prominent firms with ties to Deng Xiaoping's family were at risk, and less attractive to investors, once Deng died).

related legal environments may not mean as much change as some think. On this view, the perception of a wide gap, however rapidly closing, is misplaced. It is the product of a misleading focus on the formal rules and structures of Hong Kong's system of commercial and corporate law, which do not effectively structure the behavior of any but the most internationalized segments of business in the territory. The "rule of law" undergirding coldly rational and impersonal business dealings has never been, on this account, all that it is often claimed to be in the colony. From this perspective, the reliance on *guanxi*, shared values, and non-legal sanctions that some see, and dread, as a mark of change in the territory is not so new. All that has changed is that mainland actors — among whom similar and compatible orientations and practices have reemerged strongly during the reform period — have become increasingly deeply woven into the web of an informal and extralegal order.⁶⁶

On the other hand, there has also been significant convergence from the P.R.C. side. Although problems of corruption and poor implementation are serious and extensive reliance on informal channels continues, the rapid development of a much-used and partially-effective legal system for business, and especially for foreign trade and investment, remains a striking feature of the reform era. Hong Kong-based businesses and others have demanded and encouraged such movement toward a system that provides some elements of the legal rules and legal certainty that they have come to expect in Hong Kong and in other places deeply integrated with the global economy.⁶⁷

⁶⁶ See, e.g., Batson, *supra* note 53 (describing the shift of influence to firms and executives with strong informal P.R.C. ties); Frank Ching, *Danger Signals for Hong Kong*, FAR E. ECON. REV., Oct. 17, 1996, at 36 (quoting Xinhua's summary of Jiang Zemin interview discounting the importance of the rule of law in Hong Kong's past success); *Preparation Means Success; No Preparation Means Failure*, WEN WEI PO, Dec. 12, 1993, at 2; Chris Yeung & Connie Law, *China Hits Patten for Deal with Jardines*, S. CHINA MORNING POST, Sept. 14, 1994, at 1 (discussing charges of British authorities' politically motivated favoritism in dealing with local Hong Kong firms).

⁶⁷ See generally Jerome A. Cohen & Stuart J. Valentine, *Foreign Direct Investment in the People's Republic of China: Progress, Problems and Proposals*, 1 J. CHINESE L. 117 (1987); Daniel Fung, *Survival of the Rule of Law in Hong Kong After the Resumption of Chinese Sovereignty*, 18 U. PA. J. INT'L ECON. L. 41 (1997); John T. Shinkle, *Observations on Capital Market Regulation: Hong Kong and the People's Republic of China*, 18 U. PA. J. INT'L ECON. L. 255 (1997). Much of this move toward "Western" or "international" norms was

3.2. *Politics and Government: Parallels, Convergence, and the Irrelevance of Ideology*

In the politics and governance of Hong Kong, there is much that points to a long transition narrowing a Hong Kong-P.R.C. gap that arguably is less yawning than it sometimes has appeared to be. In the political sphere, as in the economic realm, colonial Hong Kong has been, for much of its history, vulnerable to China, and therefore dependent upon it. At least throughout the P.R.C. era, British-ruled Hong Kong's security has relied on China's military and political forbearance, a state of affairs that imposed an implicit check on the tolerance of "anti-P.R.C." activities in the territory (although not on the government's suppression of pro-communist organizations and activists), and precluded serious consideration of decolonization leading to independence for Hong Kong. After Great Britain and the P.R.C. reached an agreement returning the territory to China (a result that China had long insisted was the only acceptable resolution), movement toward a more extensive and less tacit integration of Chinese and Hong Kong politics and government accelerated.

The Joint Declaration itself provided for a Sino-British Joint Liaison Group ("JLG") empowered to conduct bilateral "consultations" on the implementation of the Joint Declaration and on "such subjects as may be agreed by the two sides," and to "discuss matters relating the smooth transfer" of government authority over Hong Kong during the 1985-2000 period. In keeping with this mandate, the JLG has been a significant venue for addressing the legal and political-structural questions of the transition (although not the only one, nor a uniformly successful one). In addition to its enumerated and originally contemplated functions, the JLG has also served as a forum for attempting to resolve other concrete, transition-related controversies of the 1980s and 1990s. Most famous among these was the wrangle over building new airport and shipping facilities. Because these projects required the granting of large public contracts straddling the handback date, they raised Chinese concerns that the British authorities might be mortgaging Hong Kong's future, and prompted Chinese threats to

clearly by design. Many of China's reform-era economic laws have been consciously based on Western models and, in some cases, influenced by advisers and consultants from the West or trained there.

disavow the contracts — spawning a controversy that for a time expanded the JLG's prominence in the territory's pre-reversion affairs and underscored for many Hong Kongers the growing entanglement of P.R.C. and Hong Kong politics.⁶⁸

The JLG's formal authority and actual role was still modest compared with that of other organs set up, especially in later years. The middle 1980s saw the creation of the Basic Law Drafting Committee ("BLDC") which included thirty-six P.R.C. members and twenty-three P.R.C.-approved Hong Kong members (including a pair of prominent democrats). Created by and reporting to the NPC, the BLDC was charged with drafting the "mini-constitution" to set forth the key structures and fundamental rules for government and law in the S.A.R.⁶⁹ The 1990s brought a Preliminary Working Committee ("PWC") and a Preparatory Committee ("PC"). Established by the NPC Standing Committee in the wake Governor Patten's franchise-expanding constitutional reforms, and composed of P.R.C.-approved Hong Kong members and an almost equal number of P.R.C. members, the PWC was given a mandate to prepare the ground for the establishment of the PC and, in practice, to exert greater Chinese control over a transition process in which the British were no longer cooperating to China's satisfaction. Established with NPC authorization in January 1996 and required by legislation to draw at least half of its members from Hong Kong (and the rest from the mainland), the PC was directed to undertake such vital tasks as prescribing the specific method for forming the first S.A.R. legislature, preparing the establishment of the Selection Committee for the first S.A.R. government, and more generally "preparing the establishment" of the S.A.R. In practice, its role increasingly approached that of a shadow government, speaking with considerable authority on a host of legal, economic, and other issues

⁶⁸ See Joint Declaration, *supra* note 1, annex II; see also Stacy Mosher, *Creeping Interventionism*, FAR E. ECON. REV., July 18, 1991, at 10 (concerning JLG's Airport Commission).

⁶⁹ See, e.g., Ji Pengfei Addresses Hong Kong Basic Law Committee, Xinhua News Agency, July 1, 1985, in BBC, Survey of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (discussing the speech given by BLDC chairman at BLDC's initial meeting, outlining Committee's mandate from the NPC); see generally Ming K. Chan, *Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90*, in THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY? 3 (Ming K. Chan & David J. Clark eds., 1991).

concerning the transition. Most notoriously, in January 1997, the PC formally recommended (via its legal sub-group) the repeal of recently enacted Hong Kong legislation that had offered belated protection for a variety of liberal political rights.⁷⁰

As the final months of British rule approached, setting up and staffing the S.A.R.'s key governmental institutions in advance of the hand-over became the order of the day. After the P.R.C.-backed Selection Committee of four hundred Hong Kong residents nominated Tung Chee-hwa as Chief Executive and picked a "Provisional Legislature" or "Provisional Legislative Council" ("PLC") to replace the last colonial Legco, and with a "through train" still promised for the civil service, the key elements of a full government-in-waiting were in place by late 1996. With the lame duck quality of the colonial regime increasingly evident, Governor Patten had already laid the groundwork for advancing the transition a step further, having pledged consultation and cooperation with the Chief Executive-designate (in addition to having urged an "early" selection of an occupant for the post). The government-to-be took matters a step or two further in early 1997, with the future Chief Executive weighing in — and supporting China's position — on such matters as the advisability of repealing the controversial political and civil liberties legislation of the terminal colonial period, and with the Provisional Legislature convening in Shenzhen and asserting its

⁷⁰ See, e.g., NPC Decision, *supra* note 47, §§ 2-3 (authorizing PC); *All Set for Hong Kong's Return, Says Qian Qichen*, Xinhua News Agency, Mar. 10, 1997, in BBC, Survey of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing NPC's adoption of PC recommendation on repealing Hong Kong law reforms); *Foreign Minister Reviews Recent History of Hong Kong Reversion*, Xinhua News Agency, Mar. 10, 1997, in BBC, Survey of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (noting comments of PC chairman and P.R.C. Foreign Minister Qian Qichen regarding reviewing powers and activities of PC); *New Working Panel Members Appointed for Hong Kong Transition*, Xinhua News Agency, May 26, 1994, in BBC, Survey of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing the functions and expansion of PWC); Tsang Yok-sing, *Selecting the Right Electoral System*, S. CHINA MORNING POST, Feb. 18, 1997, at 16 (mentioning the leader of pro-China Hong Kong party commenting on PC's consideration of electoral laws); *Work of Preparatory Committee for HK SAR Praised by Legislator*, Xinhua News Agency, Mar. 3, 1997, in BBC, Survey of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing the work of PWC and PC).

authority to consider legislation for post-1997 Hong Kong.⁷¹

More broadly, an extensive pre-1997 transition to Chinese rule, on China's terms, has seemed evident in the outcome of many debates over the S.A.R.'s legal and political structures, at least when viewed from the vantage point of those in Hong Kong who have been critical of the British and colonial authorities' handling of those issues. Frequently cited examples of the asserted slide toward P.R.C. norms and preferences read like a catalogue of the major political and legal institutional controversies of the 1980s and 1990s. The Basic Law drafted by the BLDC during the latter part of the 1980s arguably fell short of the promises of the Joint Declaration, or at least resolved the Joint Declaration's ambiguities in a direction unfavorable to proponents of a strongly autonomous and broadly liberal-democratic Hong Kong. Coming without strong objection from Britain or its administration in Hong Kong (both of which were not formally involved in the drafting process), the Basic Law permitted restrictions on democratic elections, judicial review, and individual liberties that seemed tighter than what the Joint Declaration mandated.⁷²

⁷¹ See, e.g., NPC Decision, *supra* note 47, §§ 3-4 (prescribing Selection Committee membership and functions); *China Welcomes Election of First Chief Executive*, Xinhua News Agency, Dec. 11, 1996; *Foreign Minister Reviews Recent History of Hong Kong Reversion*, *supra* note 70; Wang Hui Ling, *Ex-Patten Adviser Elected Head of Provisional Body*, STRAITS TIMES (Singapore), Jan. 26, 1997, at 13 (quoting PLC members on the organ's powers and agenda); John Ridding & Philip Stephens, *Patten Firm Over HK Legislature*, FIN. TIMES, Sept. 16, 1996, at 5 (quoting the Governor's reiteration of support for early selection of the Chief Executive, intention to cooperate with Chief Executive-designate, and refusal to recognize Provisional Legislature).

⁷² Compare Joint Declaration, *supra* note 1, annex I, § I (stating S.A.R. legislature "shall be constituted by elections") with Basic Law, *supra* note 4, art. 68 (qualifying Joint Declaration language, adding that the "method for forming the Legislative Council shall be specified in light of the actual situation" in the S.A.R. and "in accordance with the principle of gradual and orderly progress" with the "ultimate aim" being election by universal suffrage), and Joint Declaration, *supra* note 1, annex I, §§ I, II (granting the "power of final judgment" and judicial independence to S.A.R. courts and investing them with "independent judicial power" "[e]xcept for foreign and defense affairs") with Basic Law, *supra* note 4, arts. 19, 160 (granting the NPC Standing Committee authority to interpret the Basic Law, denying S.A.R. courts jurisdiction over "acts of state" such as defense and foreign affairs), and Joint Declaration, *supra* note 1, annex I, § XIII (listing specific rights and providing that the provisions of the principal U.N. covenants shall remain in force) with Basic Law, *supra* note 4, arts. 24-38, 39, 23 (restating Joint Declaration catalogue of rights, arguably making them more dependent upon and subject to restriction by local legislation, and obliging the S.A.R. legislature to enact laws against treason,

In the 1990s, the Court of Final Appeal arrangement that emerged from Sino-British negotiations acquiesced in China's position limiting to one the number of expatriates who could serve on the five-member bench, and delayed establishment of the court until the last possible moment. The controversial and initially secret agreement on the court's membership exacted what Hong Kong critics saw as an unacceptable concession to P.R.C.-style legality. One bill to implement it met with a negative vote in Legco. A similar bill passed four years later, but also precipitated an attempt by Legco liberals to pass a no-confidence vote against the Patten government (a move that, even if successful, would have been only of symbolic importance).⁷³

During the same period, colonial authorities also yielded — much too meekly in the eyes of the territory's ardent democrats — to China's opposition to expanding Hong Kong representative bodies' electoral base and their role in the colony's government. Patten's reforms were themselves rather modest. The electoral law changes were crafted to be defensible as interpretations of the Basic Law and the Joint Declaration, and stopped well short of full universal suffrage. The governor's policy of expanding Legco's role also left it with powers still much more limited than those of a conventional legislature.⁷⁴ Once China made clear that it flatly rejected those moves, dismissing the electoral reforms as in contravention of the Joint Declaration, the Basic Law, and shadowy Sino-British informal agreements, and declaring that the Legco elected under those laws would not be allowed to "ride the through train" to become the S.A.R.'s first legislature, the British authorities publicly expressed regret and disappointment at China's unwise decision. But they eschewed more confrontational courses urged by some of the territory's pro-democracy politicians, which included calls for a more thoroughgoing move

sedition, subversion, theft of state secrets, and maintenance of ties with foreign political organizations).

⁷³ See, e.g., Stacy Mosher, *Court of Contention*, FAR E. ECON. REV., Dec. 19, 1991, at 10 (discussing the defeat of 1991 court bill); Louis Won & Catherine Ng, *Fight Not Over, says Martin Lee*, S. CHINA MORNING POST July 27, 1995, at 1 (discussing the passage of 1995 bill); Chris Yeung & No Kwai-yan, *Governor Survives Vote*, S. CHINA MORNING POST, July 13, 1995, at 1 (describing failure of the no-confidence motion).

⁷⁴ See *supra* notes 28-30.

toward universal suffrage for Legco.⁷⁵

Along with the lessons drawn from such moments of confrontation or capitulation on specific issues of the S.A.R.'s legal and political structure, a more diffuse sense has developed over several years that the Hong Kong branch of the official *Xinhua* News Agency (China's longstanding *de facto* embassy in the territory) and the P.R.C. State Council's Hong Kong and Macao Affairs Office have been speaking for those who hold real power in the territory. The widely held perception is that Britain had ceded much of the field in Hong Kong politics and government well in advance of 1997 — whether prematurely (a reflection of British indifference and irresponsibility) or inevitably (a pragmatic recognition of the U.K.'s extremely weak position once the basic point of Hong Kong's reversion to Chinese sovereign authority had been conceded).

Despite the electoral triumphs of parties quite critical of the P.R.C.'s plans for the territory, Hong Kong's nascent party and parliamentary politics also has features that suggest a gradual convergence and integration underway for years. For example, the Democratic Alliance for the Betterment of Hong Kong ("DAB"), and other less prominent and less successful organizations, emerged to articulate positions favorable to the P.R.C. and to field candidates in Hong Kong's increasingly contentious and democratic elections during the 1990s. Moving beyond the representation of P.R.C.-sanctioned views in Hong Kong's "left" or "pro-China" press, Tsang Yok-sing and other DAB leaders emerged as a new kind of voice in the political debates of the era.

Their statements have received extensive coverage in the mainstream press alongside the views expressed by Democratic Party

⁷⁵ In the P.R.C.'s jargon, Patten's plan suffered from the "three non-conformities" — non-conformity with the Joint Declaration, the Basic Law, and a series of secret Sino-British agreements concerning the transition. On democratization proposals in Hong Kong after the P.R.C. announced that the through train would be derailed if the Patten reforms were adopted. See, e.g., Peter Humphrey, *China Sets Up New Legislature, Punishes Dissenter*, Reuters, Mar. 24, 1996 (describing British opposition to establishment of PLC and planned disbanding of Legco); *H.K. Candidates Scrambling Before Sunday's Poll*, Japan Econ. Newswire, Sept. 16, 1995 (discussing Democratic Party's call for fully elected legislature); Louise do Rosario, *Patten's Progress*, FAR E. ECON. REV., July 14, 1994, at 21 (describing Emily Lau's proposal, one that came close to winning a majority in Legco, calling for universal suffrage for all seats in the 1995 Legco elections).

notables and other pro-democracy politicians, representatives of the Liberal Party and other "pro-business conservative" organizations, and spokespersons for the colonial government's positions.

In addition, members of the territory's business elite who have not been members of the DAB or other China-backed parties, but who have pressed what are generally labeled "pro-China" views, have held a considerable number of seats in Legco and the cabinet-like, policy advice-providing Executive Council ("Exco"). Indeed, the alliance between pro-China members and so-called business conservatives anchored a Legco coalition that came within one vote of defeating Patten's proposed electoral reforms in 1994, and provided crucial support for the 1995 Court of Final Appeal bill that Democratic Party leaders and their allies so bitterly denounced.⁷⁶

Whether members of Legco, Exco, and pro-business political parties, or only of a broader economic elite, "pro-China" business leaders or "business conservatives" have done much to effect a significant political integration between Hong Kong and China during the decade-and-a-half before 1997. Members of a group that had long enjoyed great formal and informal influence with the colonial government, some of the leading lights of Hong Kong business steadily acquired roles as advisers to, and intermediaries with, China. Their actions included undertaking unofficial "pilgrimages" to Beijing to discuss Hong Kong's fate with Deng Xiaoping even before the U.K. and China signed the Joint Declaration, winning designation as quasi-official "advisers" to China, and joining recognized "pro-China" Hong Kong members on the key transitional organs known by an alphabet soup of initials that has characterized recent Hong Kong politics: the BLDC, the BLCC, the PWC, the PC, and the PLC.⁷⁷

The early and, to many, odd alliance between self-proclaimed avatars of Chinese-style socialism and captains of capitalist industry suggests that any political and governmental gap that needed to be closed or accommodated in the run-up to reversion was smaller than it may have seemed. And there is much to

⁷⁶ See, e.g., Mary Kwang, *What Victory?* STRAITS TIMES (Singapore), July 2, 1994, at 4 (describing the vote on political reform bills); Chris Yeung et al., *Fight Not Over, Says Martin Lee*, S. CHINA MORNING POST, July 27, 1995, at 1 (describing Legco alignment on the Court bill).

⁷⁷ See generally deLisle & Lane, *supra* note 18, and *supra* notes 70, 71.

suggest that the gap was shrinking for reasons having less to do with Hong Kong's reversion than with independent pressures for changing the increasingly anachronistic structures of Hong Kong's colonialism and China's Leninism.

In some respects, the understandings of politics and government that have emerged in recent years among elites on opposite sides of Hong Kong's colonial boundary have not been poles apart. The post-Mao reforms in China have produced a regime that has staked its legitimacy on securing economic prosperity, and has bet that the way to do so is through encouraging or requiring firms to be more geared toward seeking profit, more attuned to market signals, and more engaged in the international economy. A Hong Kong *taipan* could find little to quibble with in the view that this is what politics is properly about. Moreover, China's embrace of a political agenda strongly favoring markets, trade, and business was more unrestrained in the prospering provinces nearest Hong Kong than it was in Beijing — so much so that the central authorities have sometimes worried about the "Hong Kongization" of a region to which Beijing's writ does not effectively run when it tries to impose moderate austerity or modest political orthodoxy.⁷⁸

At the level of more specific policies, the chronic fiscal burden of footing the "welfare" bills (as well as the on-going core operating deficits) of unreformed state enterprises has produced among some P.R.C. leaders a concern about ruinous social spending that has dove-tailed with the attitudes of Hong Kong's notoriously *laissez-faire* business establishment. In Beijing policy circles, the problem of the "iron rice bowl" (*tiewan*) (secure tenure of state enterprise employees) and its attendant web of services (including housing, schooling, and pensions) has, in recent years, steadily climbed in the rankings of perceived obstacles to further market-oriented economic reform laws and policies.⁷⁹

During the same period, a parallel set of worries was growing on the other side of the border. In Hong Kong business circles,

⁷⁸ See generally, VOGEL, *supra* note 65; LIEBERTHAL, *supra* note 26, at 315-30.

⁷⁹ See, e.g., BAUM, *supra* note 33, at 169-74 226-28; NAUGHTON, *supra* note 13, at 284-88; *Attach Great Importance to Implementing Conscientiously the Re-Employment Project*, RENMIN RIBAO, Jan. 29, 1971, at 1; Edward Cody, *China Mills Close a Chapter*, INT'L HERALD TRIB., Jan. 6, 1997, at 1; see also *supra* note 15.

a long-standing dogma that expanding the welfare state would sap the dynamism of Hong Kong's work force, and a strong aversion to paying the taxes necessary to support social spending collided with the Patten administration's proposals to provide greater social security benefits for elderly Hong Kongers while also continuing the colony's vast subsidized housing program and other social services. Such convergent sentiments among P.R.C. political leaders and Hong Kong business leaders, together with China's more immediate fears that the last colonial budgets were imperiling the Hong Kong government's fiscal health, produced a striking political alliance in opposition to the colonial government's social spending initiatives.⁸⁰

There is also an almost sociological dimension to the quasi-ideological convergence of elites that has closed the Hong Kong-China political gap during the years prior to the territory's reversion. Amid the reform policies of the Deng Xiaoping era, the most spectacularly ascendant elite in the P.R.C. (and not least in the dynamic region abutting Hong Kong) has been a stratum of cadres, and their relatives, turned entrepreneurs. Established political power has transformed into new, complexly entangled economic and political power. At the same time, in response to the reforms in late colonial Hong Kong politics that have made government more extensively consultative and at least modestly democratic, the business elites of Hong Kong have become more "political," making their voices heard more loudly in public debates and engaging in electoral politics to secure new bases for influence in institutions and processes that previously had not mattered much or could be counted upon to pursue the interests of business.⁸¹

⁸⁰ See, e.g., *For Many Corporate Chiefs, 1997 Cannot Come Soon Enough*, ASIAWEEK, Dec. 7, 1994, at 23; *Increasing Tax in Disguised Form, and Shifting Misfortune to the Special Administrative Region*, WEN WEI PO, Dec. 17, 1993, at 2; Jonathan Karp, *Money Talks*, FAR E. ECON. REV., Mar. 17, 1994, at 18; William McGurn, *Diminishing Returns*, FAR E. ECON. REV., June 13, 1996, at 62.

⁸¹ On cadre-entrepreneurs and relationships between cadres and entrepreneurs in reform-era China, see generally, JEAN OI, *STATE AND PEASANT IN CONTEMPORARY CHINA* 183-226 (1989); SOLINGER, *supra* note 19, at 256-74. At more elite levels, the phenomenon of intertwined economic and political power is most starkly evident in the emergence of the *taizidang* — the group of "princelings," who have taken prominent roles at major companies, and helped those companies to prosper, by virtue of the political connections and clout that stem from their status as children of Party elders. On the

Such newly hybridized political-economic elites on both sides of the China-Hong Kong frontier would seem to have reason to embrace the broadly similar, and similarly tepid, attitudes toward democracy that they do seem to hold. Plausibly confident that the policy orientations they favor and the economic miracles they have helped to produce enjoy popular support, both groups could reasonably see little need for tight political repression or restrictions on the expression of heterodox views. Such a semi-tolerant stance had greater appeal given that heavy-handed moves could threaten to exact a significant economic cost by alienating educated elements in the local work force or by scaring off foreign investors who might be wary of political instability abroad (that might put their profits and capital at unexpected risk) or political pressure at home (not to invest in countries with poor records on human rights and civil liberties).

On the other hand, both groups have had enough exposure to the possible consequences of elections and popular opinion to be wary of what full, contestatory democracy could mean for their hold on power and the future of some of the policies they hold dear. After all, the most strongly pro-business candidates have fared poorly in contests for Hong Kong's most broadly-based electoral constituencies, losing to "pro-democracy" candidates who, business leaders have feared, might open the tap of profligate government spending. While China's incumbent cadre-entrepreneurs have often come out winners in semi-open local elections and expressed confidence that they would prevail in more open contests as well, their record of success is mixed. And the growth of popular discontent with some of reform's side effects, together with the general disesteem in which the party is held, would provide undeniably fertile ground for candidates running on a platform critical of some established policies and many entrenched privileges — especially if relatively open elections in China were to be extended to less purely local offices.⁸²

increasingly organized and visible public political role of business in Hong Kong, see generally, MINERS, *supra* note 8, at 196-203; see also Bellette Lee, *Political Flag for Business*, S. CHINA MORNING POST Oct. 23, 1990; James Tien, *HK Can Survive Under One Country, One System*, S. CHINA MORNING POST, May 2, 1993, at 11 (stating that business leaders accept Patten's point that business should participate in electoral politics).

⁸² See *supra* note 33; Wu Naitao, *Direct Election of Township Deputies*, BEIJING REV., Mar. 17-23, 1997, at 20 (concerning Chinese local elections); see

3.3. "1997"-Focused Strategies and the Prolonged Transition

Hong Kong's "long transition" is not just a function of convergence and integration that have been occurring before July 1, 1997. For those not claiming clairvoyance and not persuaded by an ideological assumption that the 1997 solution is destined to succeed or doomed to fail, the transition promises to be "long" on the far side of 1997 as well. Some vital questions about the shape and character of Chinese-ruled Hong Kong are unlikely to be answered until well after the founding of the S.A.R. At some level, protracted uncertainty may be nearly inevitable whenever potentially sweeping forces of change are introduced into an environment that has been as complex, adaptable, and resilient as Hong Kong has long shown itself to be. Facing the diverse pressures that 1997 will introduce, Hong Kong seems likely to be neither intractably hostile nor unquestionably pliable. Beyond that, two more specific features of transitional Hong Kong point to a prolonged period during which we are unlikely to see definitive resolution of legal and institutional issues that matter for Hong Kong's economic and political prospects.

First, the strategies of the principal participants in the political struggle over Hong Kong's future order have focused so relentlessly on the "1997 question" that adaptation to the different circumstances of post-reversion politics is likely to be a slow and wrenching process. On the P.R.C. side, a shrill insistence on the principle of China's absolute sovereignty over Hong Kong has meant deep, and growing, intransigence in response to anything suggesting the assertion of a "right" to autonomy or self-determination in Hong Kong. China has firmly rejected much of the Bill of Rights Ordinance, related changes in substantive colonial legislation, Patten's electoral reforms, and proposals for a more powerful and clearly independent CFA in part because China has

generally, NICHOLAS D. KRISTOF & SHERYL WUDUNN, CHINA WAKES 160-83 (1994) (discussing peasant discontent); Stanley Rosen, *The Impact of Reform Policies on Youth Attitudes*, in CHINESE SOCIETY ON THE EVE OF TIANANMEN: THE IMPACT OF REFORM 283 (Deborah Davis & Ezra F. Vogel eds., 1990) (describing discontent and alienation among youth). On elections and business parties in Hong Kong, see generally MINERS, *supra* note 8, at 115-20, Elfred Vaughan Roberts, *Political Developments in Hong Kong: Implications for 1997*, in 547 ANNALS 24, 27-35 (1996); Louise do Rosario, *Stand Up and Be Counted*, FAR E. ECON. REV., Sept. 28, 1995, at 16.

construed such moves as attempts to usurp or undermine its sovereignty over the territory, exceeding what China has authorized in the Joint Declaration and the Basic Law. Simply, the dominant concern has been to prevent or to counter developments before 1997 that might complicate or compromise China's exercise of sovereignty after 1997.⁸³

In P.R.C. and CCP legal and political theory, there is ample room for the Chinese sovereign to grant, as a matter of prudence and discretion, much more in the way of local autonomy, protection of individual rights, and the like than China has been willing to permit the colonial government to assert in these instances. Once the events of July 1 officially recognize and more firmly and formally establish that exercises of sovereignty over the territory are for China alone to undertake directly or to delegate to S.A.R. organs, a climb-down on such substantive issues should become more politically tolerable to the P.R.C.⁸⁴

Still, for several reasons, any such moves are likely to be difficult in practice for some time to come. Positions that China has so firmly embraced for so long are not easily reversed or reformed in response to changed circumstances. After years of confrontation and conflict, a certain cast-in-stone quality characterizes China's distrust of Hong Kong's avowedly pro-democracy forces, and of less visible and vocal elements in the civil service and elsewhere who might have absorbed — too well for China's tastes — the values of the departing colonial authorities. Such habits of suspicion could well create a lingering impediment to China's working effectively with almost any segment in Hong Kong that has not clearly shown itself to be "pro-China" well in advance of 1997.⁸⁵

⁸³ On these issues, see Jacques deLisle & Kevin P. Lane, *Hong Kong's Endgame and the Rule of Law (I)*, 18 U. PA. J. INT'L ECON. L. 195 (1997).

⁸⁴ For a reflection of China's basic view in formal, legal sources, compare Xianfa, *supra* note 32, pmbl, arts. 2-3, which declares the P.R.C. to be a "unitary state" with all state power belonging to "the people" and to be exercised by the National People's Congress and subordinate and local organs "under the unified leadership of the central authorities"; and Basic Law, *supra* note 4, art. 1, stating that Hong Kong is an inalienable part of the P.R.C. with Xianfa, *supra* note 32, art. 31, which provides a wide latitude in establishing and conferring powers upon S.A.R.s, and Basic Law, *supra* note 4, art. 2, which grants the S.A.R. a "high degree of autonomy."

⁸⁵ See, e.g., Cai Cheng Says Beijing Government Will Not Go to Hong Kong to Arrest Hong Kong People for Doing Something in Hong Kong that Affects the

Moreover, any inclination that does arise among the Chinese leadership to revamp its approach toward various groups in the territory may take some time to implement. Generally, any major reorientation must overcome considerable inertia, and raises the concern that a too-sudden shedding of old stances will make new commitments not credible. Moreover, any such moves may be further delayed by the politics of transition among the top leadership that is still underway in Beijing. For leaders who are not fully out of Deng's shadow and who are potentially vulnerable to attacks from their colleagues and subordinates, there is little appeal in a "soft" position that might be construed as undercutting 1997's triumphant reversal of nineteenth-century imperialist affronts to the Chinese nation.

At the other end of the political spectrum, Hong Kong's liberal activists, pro-democracy politicians, and, at times, the colonial government have pursued a primarily pre-reversion-focused agenda as well. The principal political initiatives of the last decade all reflect an effort to give a pre-1997 head start to institutions and rules that would embody and protect liberal values, democratic norms, and the principle of Hong Kong's autonomy. Thus, the Patten reforms sought to establish a "through train"-riding Legco that was as broadly democratic and as strongly representative as possible. The Bill of Rights Ordinance was part of a move to make more liberal the Hong Kong laws that would be handed over to the S.A.R. and preserved under the pledge, in both the Joint Declaration and the Basic Law, to retain the laws previously in force in Hong Kong.⁸⁶ And government proponents sought to defend the Court of Final Appeal deal, flawed though it was, as a last best chance to get a common law and liberal-constitutionalist court ensconced, experienced, and invested with organizational momentum and institutional gravitas in advance of the P.R.C.'s takeover of Hong

Mainland, PING KUO JIH PAO, Mar. 4, 1997, at A4 (stating NPC Law Committee vice chairman reiterated China's determination not to let Hong Kong become a base for subversion, but pledged moderation in pursuing offenders in Hong Kong); Linda Choy, *Tung Pledge to "Subversive" Alliance*, S. CHINA MORNING POST, Nov. 9, 1996, at 6 (describing a pledge by future Chief Executive Tung Chee-hwa to tolerate and protect Hong Kong democrats whom the P.R.C. has labelled subversive).

⁸⁶ Basic Law, *supra* note 4, art. 8; Joint Declaration, *supra* note 1, para. 3(3), annex I, § II.

Kong.⁸⁷

For some democrats pledging to remain active in post-1997 Hong Kong politics, the calculus underlying a short-term focus and an often-confrontational stance has been obvious: The best results are to be achieved by pushing as far and as hard as possible for democratization and autonomy before 1997. While the territory's new rulers may move to roll back such reforms, it will be somewhat costly or difficult for them to do so. And a meeker course of compromise offers no greater assurances that the more modest promises it might produce would not be eroded or betrayed even more easily. For their sometime allies among the British authorities, the logic of a pre-1997 strategy (albeit one more limited in its aims and more accommodating in its manner) has been still more simple and self-evident: While their power over Hong Kong has been waning steadily for years, they are, simply, gone after July 1, left holding nothing more than an effectively unenforceable claim at international law under a bilateral agreement that China regards as something less weighty than a treaty exchanging Britain's renunciation of sovereignty for China's guarantees about how Hong Kong is to be ruled.⁸⁸

Whether this 1997-focused approach, with its disputed successes and its substantial disappointments, or a more post-1997-focused alternative will appear, in retrospect, to have been the more promising tack for a liberal and legalist agenda for post-reversion Hong Kong is uncertain. What the road taken clearly has done is to leave us less able to discern what a strategy in

⁸⁷ See generally Frank Ching, *Toward Colonial Sunset: The Wilson Regime, 1987-1992*, in PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1992 173, 189-91 (Ming K. Chan ed., 1994); Louise do Rosario, *No Appeal*, FAR E. ECON. REV., May 18, 1995, at 22 (quoting Attorney General Mathews argument that the 1995 bill should be accepted in order to prevent a judicial vacuum and a license for China to adopt a still-less palatable court arrangement).

⁸⁸ See, e.g., George Hicks, *Trouble Ahead in Hong Kong?*, INT'L HERALD TRIB., July 4, 1996 (arguing that the tactics and successes of Hong Kong's most uncompromising democrats have made a roll-back or crack-down more costly for Beijing); Simon Holberton, *Detour for the Through Train: Chris Patten's Proposals for Greater Democracy in Hong Kong are a High-Risk Strategy*, FIN. TIMES (London), Nov. 10, 1992, at 20 (quoting Martin Lee on Democrats' perspective that democratic reforms were worthwhile despite Chinese threats); Diane Stormont, *Rifkind, Tung No Meeting of Minds on Hong Kong*, Reuters, Feb. 16, 1997 (quoting pro-Beijing Legco member's dismissal of British authorities as already irrelevant).

pursuit of the same general goals will look like after 1997, when the battles to be fought, and the array of forces to be considered, change by virtue of the transfer of sovereign authority to Chinese hands, and the installation of a P.R.C.-backed (and P.R.C.-picked) S.A.R. government.

Two of the early instances of the new politics of addressing truly post-1997 issues further illustrate the point. Political leaders on the "liberal" or "pro-democracy" side recently have been scrambling to form, and jockeying for position within, new organizations that hope, in some form and to some degree, to assume the mantle worn in pre-1997 Hong Kong by the Democratic Party and its predecessors, the United Democrats of Hong Kong and Meeting Point. Among the issues at stake early in this process have been distinctly post-reversion questions, such as whether to reject completely the possibility of membership in or cooperation with the legislature that will take office on July 1, 1997; what compromises (if any) to make in order to cultivate channels of communication with China; whether to contest the 1998 elections for the S.A.R.'s first legislature; what electoral rules, structures of constituencies (single or multi-member districts) and standards of eligibility for candidates are acceptable or desirable for those elections; and whether pro-democracy politicians would be better off forming new parties or rallying around the established Democratic Party which has been the strongest political organization in the territory but which has been most strongly condemned by China.⁸⁹

The positions articulated in the very different context of battles focused on late colonial era electoral reform, and other issues of the 1980s and 1990s, do not neatly generate views about such concrete questions of the post-1997 world. Indeed, pro-democracy politicians' forced one-year exile from legislative politics might have a silver lining (assuming the hiatus in open

⁸⁹ New groupings include Frontier, in which the uncompromisingly pro-democracy independent legislator Emily Lau plays a prominent role, and the People's Rights Party planned by the more moderate pro-democracy independent legislator Christine Loh. On the groupings and the issues that have sometimes divided the democratic camp looking beyond 1997, see David Chu, *Fact and Fiction in the New Legislature*, S. CHINA MORNING POST, Nov. 14, 1996, at 18; Dominic Lau, *Few Economic Fears as HK Heads for China Handover*, Reuters, Mar. 2, 1997; Pilar Pereyra, *HK Politics Looking Good 100 Days Before Handover*, Japan Econ. Newswire, Mar. 22, 1997; Fanny Wong, *Loh Looks for Company*, S. CHINA MORNING POST, May 2, 1996, at 19.

elections does end in 1998). For all its evident perils, an involuntary post-reversion sabbatical appears to have the virtue of giving them a chance to reflect, reorganize, and reorient, and to get a better sense of the new regime's shape and tone before they have to react coherently.

On the "pro-China" side, the naming of Tung Chee-hwa as Chief Executive-designate, followed by the assembling of other major pieces of a S.A.R. government-in-waiting, has brought a complex series of posturings and proddings that reflect the problems of adjustment from what had been a heavily pre-1997 focused approach. Tung Chee-hwa has sometimes refused the Basic Law-prescribed term "designate" as a qualifier to his title, and China has deemed the Provisional Legislature free to begin considering legislation for the Hong Kong S.A.R. from its temporary quarters across the border in Shenzhen. With such moves, the tactics pursued in earlier conflicts over the legislative through-train and the Court of Final Appeal have been reversed in key respects. The China and pro-China side has switched from trying to delay the effective operating date of controversial institutions to trying to advance it. Where China and its allies had worried about the development of "subversive" or government-weakening practices and orientations in organs that the colonial authorities were planning to foist on the S.A.R., the P.R.C. and its supporters have recently worked to gather power and establish momentum for the more politically reliable organs of their own creation. This has meant obtaining for them a more prominent place at the table in Hong Kong's pre-1997 governance where the British authorities have been willing to cooperate, and asserting their authority to parallel (and ultimately to supersede) the activities of current Hong Kong institutions where the colonial government has been more recalcitrant.

Efforts to justify and explain such moves have necessarily entailed a wrenching reorientation away from the types of arguments that China and its allies had earlier deployed. Where the P.R.C. and its supporters once had attacked British colonial authorities' moves to create or reform local laws and institutions as incompatible with the spirit and substance of the Joint Declaration and the Basic Law (if not always the literal and ambiguous text), China now has had to defend its seemingly analogous moves as not inconsistent with the texts and as actions that the Joint Declaration and the Basic Law could not properly

have prohibited. Against the backdrop of a pre-1997-focused line that had repeatedly chastised the British authorities for moves that sought, in effect, to extend Britain's exercise of sovereignty beyond the reversion, there could be no easy shift to a new line dismissing British criticisms of the future regime's premature grab for power as an impermissible interference with China's "internal affairs." Certainly, China's sharp invocation of its domestic jurisdiction accords with its long-standing position that Hong Kong has always been part of China. Still, the new arguments about the Chief Executive and the Provisional Legislature, when juxtaposed with China's assault on the Hong Kong government's institution-creating and law-reforming moves of the early and middle 1990s, has produced especially serious concerns of hypocrisy and a lack of *bona fides*.⁹⁰

This situation has also made Tung Chee-hwa's position particularly delicate and thus added another complicating factor for any early assessment of the S.A.R. regime-in-practice. Convincing much of Hong Kong that Tung's executive-led government will be autonomous and independent would be a delicate and difficult task under the best of circumstances. But it has become harder in the wake of the radical shifts from a pre-1997-focused strategy that, to many, seem to suggest that a drive to maximize Chinese control over Hong Kong is the only thread of continuity in China's Hong Kong policy. In this context, Tung's position in favor of rolling back late colonial liberalizations of the Public Securities and Societies Ordinances is all the

⁹⁰ See, e.g., TA KUNG PAO, Feb. 5, 1997, at 10 (denouncing the Bill of Rights Ordinance as incompatible with Joint Declaration and Basic Law provision on retaining laws in force); Tai Ming Cheung, *Pressure Tactics*, FAR E. ECON. REV., Nov. 5, 1992, at 8 (describing Chinese criticism of Patten reforms as incompatible with Basic Law and Joint Declaration); *China Tells Britain Not to Meddle with HK*, Japan Econ. Newswire, Jan. 23, 1997 (describing P.R.C. criticism of British attempts to resist revisions to Bill of Rights and electoral laws as impermissible interference in Chinese "internal matter"); Bruce Gilley, *Jumping the Gun*, FAR E. ECON. REV., Feb. 6, 1997, at 14 (describing Chinese arguments concerning PLC and Chief Executive); *Nomination of Provisional Legislature Candidates Formally Starts*, WEN WEI PO, Nov. 18, 1996, at A2 (asserting that Provisional Legislature is not inconsistent with Basic Law or the NPC Decision); *Provisional Legislature Must Operate Before 1997*, WEN WEI PO, Aug. 31, 1996, at A2 (asserting PLC's authority to begin legislative operations before July 1); Chris Yeung, *Tung in a Legal Tangle*, S. CHINA MORNING POST, Jan. 25, 1997, at 17 (describing the Chinese view of Bill of Rights as British plot to weaken the S.A.R.).

more likely to look like a mere parroting of Beijing's long-standing threats to gut the Bill of Rights and related legal changes, and not like a genuine Lee Kwan Yew-style conservative's vision of social order and economic prosperity that Tung claims to espouse.⁹¹

A second feature of transitional Hong Kong that makes likely a lengthy post-1997 period of *de facto* transition concerns the attitudes and beliefs held by vital but less publicly vocal or openly partisan segments of Hong Kong's populace. As the participants in the often-polarized political struggles over Hong Kong's future order themselves have often insisted, much about the prospects for the legal and institutional arrangements for the S.A.R., and the general character of Hong Kong's future order, depends on such matters of social and political context.

On this front as well, the key questions seem likely to yield no clear answers in the immediate aftermath of reversion: Is the generally bullish view expressed by Hong Kong's economic elites genuine, or is it merely an attempt to curry favor with Hong Kong's future rulers and regulators, the post-1997 dispensers of government contracts and political favors? Does a real sense of security follow from business leaders' apparent confidence in China's calculation of its own self-interest, in the success of Hong Kong firms' and magnates' efforts to cultivate political connections with powerful actors on the mainland, in the innate buoyancy of Hong Kong's economy, and in the credibility of China's pledges to maintain a sound legal environment for the territory's economy? Or does the sanguine public face mask a more cautious, even pessimistic, attitude, one replete with fears about an eroding rule of law for business and its adverse economic consequences? Are companies' strategies of shifting of assets, legal and financial services, corporate domiciles, and "law governing" clauses in contracts to other jurisdictions merely, as some describe them, low-cost insurance that most firms do not think they will need to use? Or do such moves reflect deep and widespread worries about the future legal and political environment for business? Whatever their actual subjective views of Hong Kong's post-1997 prospects, are the bulk of the territory's business leaders correct in their assessments of what framework of laws and

⁹¹ See generally Margaret Ng, *Lead Us To Transparency*, S. CHINA MORNING POST, Feb. 14, 1997, at 17.

institutions Hong Kong's economy will have and what it will need beyond 1997?⁹²

The same types of questions hang over other key groups, and are equally hard to answer. How will the civil service fare under, and react to, Chinese rule in practice? Will the promises of a "through train" (denied to Hong Kong's legislators) and assurances that the civil service will not be "politicized" be implemented, and will they be enough to maintain morale and effectiveness? Does Chief Secretary Anson Chan's highly visible commitment to stay on in her job at the top of the service accurately symbolize of an executive branch staff poised to continue an unbroken tradition of service in a post-reversion executive-led government? Or are Financial Secretary Donald Tsang's striking public challenge to Tung Chee-hwa to provide a clear public accounting of his views on rolling back the Bill of Rights and related laws, and Tsang's equally striking warning to China that it needed to provide a convincing justification for changes to rights legislation, indicative of a deeply troubled "liberal" constituency within a bureaucracy that has long been publicly nonpartisan?⁹³

What of the territory's rapidly growing and economically essential professional and managerial classes? Having achieved a measure of affluence and having received advanced education in the West or in Western-style universities, they are the archetypal constituency for political liberalization, the rule of law, and electoral democracy in East Asia. And a large proportion of them hold foreign passports, affording them an exit option if Chinese rule proves too constraining. Conceivably, even relatively minor

⁹² For a more extended treatment of these issues, see deLisle & Lane, *supra* note 18; Jacques deLisle & Kevin P. Lane, *Hong Kong's Endgame and the Rule of Law (II): The Battle Over "the People" and the Business Community in the Transition to Chinese Rule* 18 U. PA. J. INT'L ECON. L. (forthcoming 1997). See also Michael Steinberger, *Pact on HK's Legal System has Not Put Fears to Rest*, BUS. TIMES, Aug. 9, 1995, at 8 (describing differing interpretations of business domicile-shifting and other strategies as either fairly insignificant low cost insurance and as indicative of serious lack of confidence in territory's future).

⁹³ See, e.g., WEN WEI PO, Dec. 29, 1996, at A3 (stating P.R.C. official's pledge that civil service would not be politicized); Amy Chew, *HK's Tsang Blasts "Meddling" by China*, BUS. TIMES (Malaysia), Jan. 29, 1997, at 4 (stating Tsang's challenge to China, and Tsang's generally outspoken views); Gilley, *Jumping the Gun*, *supra* note 90, at 15 (discussing Tsang's challenge to Tung); Xu Xingtang, *Roundup: HKSAR Taking Shape Smoothly*, Xinhua, Mar. 23, 1997, in BBC, Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (concerning Anson Chan and civil service continuity).

failures to provide what these groups have come to expect, if read as portents of betrayals and repressions to come, could prompt a significant exodus.

On the other hand, many in this stratum are strongly committed to Hong Kong, the leaders of the first generation of true Hong Kong "belongers" with identities rooted more in the territory than in China. And many remain very much part of a Hong Kong culture that, until very recently, has been uniformly and plausibly described as strikingly apolitical and only shallowly invested in the notion of a rule of law (contrary assertions by the British authorities and international business commentators notwithstanding). Thus, here too we face the question of which aspect of a Janus-faced identity will prove more relevant — with the answer depending in no small part on the future actions of the central P.R.C. authorities and the S.A.R. government.

Finally, a similar air of uncertainty surrounds a broad, ill-defined, and much fought-over group, the "Hong Kong people." Are the British colonial authorities and the territory's leading democratic politicians right when they claim that "the people" have come to embrace principles of democratic accountability, popular elections for the legislature, and the Bill of Rights? If so, China's announced plans to roll back recent legal and political reforms threaten political turmoil and, therefore, economic crisis. Or are China and its allies in the territory nearer the mark when they assert that such support for late-colonial moves is illusory or transient, and, moreover, that "the people" resent the instability and uncertainty that the reforms pressed by Governor Patten and supported by pro-democracy politicians have produced? If they are, some of the changes will be met with widespread acceptance and even a popular sigh of relief.

Again, there are signs that give both sides reason for confidence and concern. Democratic politicians have won resounding victories in the colony's most open elections, yet voter turnout has been relatively low by world standards. Large public demonstrations against a variety of Chinese moves that seem to foretell an assault on civil and political liberties in the S.A.R. have become commonplace. Still, opinion polls and anecdotal evidence suggest a growing concern that the liberal and reformist agenda of recent years has proven too provocative to China and, thus, unwelcomely destabilizing.

Ultimately, all the effort that both sides have expended on

"selling" their visions — Patten's resort to the kind of campaign trail politics with which he, unlike his Foreign Office-trained predecessors, has been comfortable, the activist and media-savvy tactics of the new breed of pro-democracy politicians and liberal journalists (and occasional journalist-politicians), and the sustained counter-efforts from the colony's long-standing pro-Beijing press, its newly founded pro-China political parties, the Hong Kong branch of *Xinhua*, and the Chinese State Council's Hong Kong and Macao Affairs Office — all seem not to have produced clearly visible and deeply rooted allegiances to either camp. Across a broad swath of the population, a common orientation appears to remain ambiguously distrustful of the P.R.C., genuinely supportive of an end to the disturbing anachronism of colonial rule, generally resigned to the inevitability of some unpalatable changes, and broadly ambivalent about strongly partisan politics of any stripe.⁹⁴

3.4. *The Irrelevance of New Institutions*

From a perspective that sees contemporary Hong Kong as a territory in the midst of a long transition, the formal and legal institutional changes that will occur around the date of the colony's formal reversion appear likely to be relatively insignificant. And their lasting impact, if there is any, seems nearly certain not to emerge until well beyond July 1, 1997.

On one hand, the basic outlines of the key legal and governmental institutions — the legislature, the office of chief executive, the civil service bureaucracy, the courts, and many of the laws for the S.A.R. — have been clear for some time. Moreover, on this view, there is relatively little left for the new laws and institutions to do once they come formally into existence. For much of what seems to matter about the transition has already been accomplished well in advance of 1997, in large part through the

⁹⁴ On issues of popular and middle-class attitudes toward legal and political aspects of Hong Kong's transition, and arguments about them, see generally, Michael E. DeGloyer & Janet Lee Scott, *The Myth of Political Apathy in Hong Kong*, 547 ANNALS 68 (1996); deLisle & Lane, *Hong Kong's Endgame and the Rule of Law (II)*, *supra* note 92; Jacques deLisle & Kevin P. Lane, *Borrowed Place, Out Of Time: Identity, Democracy and Autonomy in Hong Kong* (forthcoming 1997); *HK's Confidence for the Future on Rise: Poll*, Japan Econ. Newswire, Feb. 3, 1997; Graham Hutchings, *Hong Kong Depressed over Looming Handover*, DAILY TELEGRAPH, Jan. 3, 1996, at 10.

operation of broad forces of economic integration and political change, some of which are only tangentially related to the law and politics of Hong Kong's reversion to Chinese rule. Further, given that the formal legal and institutional structures of pre-reversion Hong Kong appear, from this perspective, to have played only a fairly modest role in defining Hong Kong's economic and political life, there is little reason to expect that the implementation of new arrangements will have a profound impact.

On the other hand, much that might matter in determining the shape of Hong Kong's future order seems, on this view, to depend upon elite strategies that have only begun to shift their foci to post-reversion Hong Kong, and upon broader social attitudes and political or economic pressures that remain fluid and often unfathomable. In such circumstances, the first months, and years, after the handover promise to reveal nothing definitive about the success, failure, or character of the legal and institutional arrangements crafted for the S.A.R., or the longer term trajectory of the territory's economy, politics, and interactions with the mainland.

4. LAW'S PROMISED EMPIRE: LAW AND POLITICS, HONG KONG AND BEYOND

Differing judgments about what constitute the crucial features of transition era Hong Kong imply divergent expectations about whether July 1, 1997 will arrive as a moment of dramatic resolution, or merely roll by as one of many scenes in a long saga of transformation. Such contrasting views also tend to align with conflicting predictions and convictions about whether the formal transfer of power will prove to be a moment of truth for the S.A.R.'s legal and institutional structure, and whether Hong Kong's future depends on the fate of those institutions and laws.

A "political alchemy" perspective and a "long transition" perspective both offer reasonably clear, if basically irreconcilable, positions on those questions. What both of those perspectives risk obscuring — and (respectively) oversimplifying and undervaluing — is the extraordinary degree to which the arrangements for Hong Kong's transition, reversion, and operation as a S.A.R. have been cast in distinctively legal forms and have centered on distinctly legal issues. As the British empire withdraws from its last great outpost and as the P.R.C. leaders who live next door to the Chinese emperors' former palace reclaim a humiliating late

imperial cession, the task of managing the transfer without causing grave injury to Hong Kong or unacceptable affront to Chinese sovereignty has promised a remarkably expansive empire for law.⁹⁵

4.1. *Law's Central Role and the Politics of Law in Hong Kong's Transition*

The two foundational documents for Hong Kong's return to Chinese rule and its functioning as a Chinese Special Administrative Region are legal instruments, albeit of disputed or complex status. As the British and many in Hong Kong see it, the Joint Declaration is a full-dress, treaty-equivalent international agreement by means of which Britain effects a transfer of sovereignty over Hong Kong and China undertakes a variety of promises concerning the transitional period and Hong Kong's post-1997 constitutional, legal, social, and economic orders. From China's perspective, the Joint Declaration is something less than a treaty and does not convey sovereignty over Hong Kong (which has always been China's). And its substantive provisions are matters of parallel declarations about how Britain is obliged to exercise administrative authority over the territory until July 1, 1997, and how China (unilaterally) intends to exercise its sovereign authority beyond that date. Still, in China's official view, the Joint Declaration remains unquestionably a document that sets forth arrangements and undertakings with international legal effect.⁹⁶

⁹⁵ See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986). For Dworkin, law's empire is defined by an "interpretive and self-reflective attitude" addressed to "politics in the broadest sense," but with the legal enterprise remaining distinct from "ordinary" politics and free of the vices (from the law-as-integrity perspective that Dworkin endorses) of mere conventionalism and pragmatism. Moreover, Dworkin notes, when law fails, there can be adverse, sometimes ruinous, material and moral consequences for the parties most immediately affected and for the broader community in which such law operates. While Dworkin's concerns are clearly jurisprudential and his focus is primarily Anglo-American judicial interpretation, these points — concerning law's close relationship to, yet distinctions from, politics and political values, and the potentially serious and sometimes intangible, normative consequences of law's failure — do resonate with the features of law's promised roles in Hong Kong's transition that Section 4 here addresses.

⁹⁶ See Joint Declaration, *supra* note 1, paras. 1, 2. For statements of official Chinese and British positions on the status of the Joint Declaration, see BEIJING REVIEW, *THE HONG KONG SOLUTION* 59 (1985); HONG KONG: THE FACTS — THE SINO-BRITISH JOINT DECLARATION 1 (1989); WHITE PAPER: A DRAFT

In addition, the Basic Law is a major piece of P.R.C. legislation, adopted by the National People's Congress. From China's perspective, it is nothing less — but also nothing more — than the product of the highest constitutionally proper exercise of China's sovereign legislative power. Although the Basic Law contains promises that China will not amend it in ways that "contravene" China's "established basic policies" on Hong Kong and pledges that a Basic Law Committee including Hong Kong representatives will be consulted before central Chinese authorities interpret or amend the Basic Law, Chinese constitutional principles (and the Basic Law itself) make the Basic Law subject to amendment by subsequent legislation — although not by anything less. From Hong Kong's perspective, the Basic Law is something more formidable than a statute, or even a "mini-constitution" for the S.A.R., as it is popularly called. It prescribes a structure and a set of substantive principles that are beyond the power of Hong Kong government institutions and the Hong Kong people to change. For those in Hong Kong who have focused on this feature, the mini-constitution has seemed to be troublingly inalterable. For others who have placed more emphasis on the Basic Law's status as a "mere" statute of the P.R.C., it is the document's vulnerability to legislative change from Beijing that has been more disturbing. Such concerns have prompted calls for amendments to the Basic Law that would declare its provisions either equal in status to the provisions of the P.R.C. constitution or subject to revision by the people of Hong Kong.⁹⁷

Despite concerns about asymmetries of status and worries about excessive rigidity or uncontrollable flexibility, the point remains that all sides officially — and, it appears, actually — regard

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA 7 (1984); Christopher Wren, *China Vows to Honor Hong Kong Pact*, N.Y. TIMES, Oct. 4, 1984, at A3.

⁹⁷ See Basic Law, *supra* note 4, arts. 158-59 (setting forth NPC's power to amend the Basic Law, including restriction on amendments contrary to China's "established basic policies" on Hong Kong; role of Hong Kong people on Basic Law Committee and in proposing amendments to the Basic Law); Xianfa, *supra* note 32, arts. 2, 58, 62 (delineating NPC's general powers of legislation); *Hong Kong: Group's Plan Tackles Flaws in Basic Law*, S. CHINA MORNING POST, Sept. 6, 1989 (describing calls to entrench Basic Law in P.R.C. law by granting its provisions the equivalent of constitutional status); *Lawmakers Create Pro-Democracy Group*, ASIAN WALL ST. J., Aug. 27, 1996, at 7 (describing demand for Hong Kong people to be allowed to make their own constitution).

the Basic Law as an instrument with as much dignity and weight as a P.R.C. statute can have, and as the principal constitutive document for the S.A.R.

Moreover, the Joint Declaration and the Basic Law are not only distinctly "legal" instruments. They are also documents that primarily address issues of law and law-related matters. Among the Joint Declaration's most prominent provisions are ones that concern Hong Kong's international legal personality, and that promise to preserve Hong Kong's common law legal system and to continue in force many of the territory's pre-reversion laws.⁹⁸ Implementing and interpreting (and, by some lights, narrowing) the Joint Declaration's sketchy undertakings, the Basic Law devotes much of its text to spelling out the constitutional details of how law-making power for the S.A.R. is to be allocated among P.R.C. state organs in Beijing, the S.A.R.'s Chief Executive, and the local Hong Kong legislature. Another substantial portion addresses what the Joint Declaration's promised "high degree of autonomy" in judicial affairs is to mean in terms of Hong Kong courts' affirmative powers, and the limits imposed by the denial of jurisdiction over "acts of state" and by Beijing's retention of significant authority to interpret and amend the Basic Law. Other much-discussed articles cover the status of the major international human rights covenants in Hong Kong law (as well as Hong Kong citizens' legal rights more generally) and laws proscribing sedition and subversion.⁹⁹

Further, laws have been both the focus and the principal medium of pre-reversion politics in Hong Kong. Throughout the 1980s, Hong Kong politics was about the Joint Declaration process, the drafting of the Basic Law and the conflicts that swirled around them. During the 1990s, the Joint Declaration and the Basic Law have remained politically important, serving as the touchstones to which all sides have turned in nearly every major political conflict over laws or institutions in Hong Kong's late transitional years. In addition, the key controversies of the period have revolved to an extraordinary degree around specific Hong Kong laws that have themselves often been concerned with

⁹⁸ See Joint Declaration, *supra* note 1, paras. 3(3), 3(6), 3(7), 3(9), 3(10), annex I, §§ II, VI, XI.

⁹⁹ See *id.* para. 3, annex I; Basic Law, *supra* note 4, arts. 2-6, 8, 11-23, 26-104, 116, 150-160.

defining and assigning law-making and adjudicative power.

These traits were evident in the row over Patten's political reforms. The focus of the clash was proposed legislation to govern elections to the last colonial Legco — an organ that was playing an increasingly significant role in colonial Hong Kong's law-making and that was slated to become the S.A.R.'s first legislature. China and its supporters attacked Patten's franchise-expanding reforms on specifically legal grounds, declaring them inconsistent with the Joint Declaration and the Basic Law. They claimed that the broad electorates for nine new functional constituencies entailed a premature and illegal move toward universal suffrage for the territory's principal representative body. On the other side of the dispute, Patten defended his moves to give law-making a more democratic basis as legally sound interpretations of capacious Joint Declaration, Basic Law, and other NPC legislative provisions governing the structure of constituencies for choosing members of a through-train-riding legislature. More broadly, the governor and pro-democracy politicians in the territory argued that the reforms were a step toward a more accountable government, which they saw as a vital underpinning to the rule of law.

When China decreed that the through train would be derailed and a Provisional Legislature appointed to take office on July 1, 1997, the issues and arguments remained law-centered. At stake, of course, were still the composition, powers, and claim to authority of the S.A.R.'s initial legislative body. China and its allies asserted that, in light of the Patten reforms' illegality, the Basic Law and the NPC Decisions (as well as China's general powers as Hong Kong's sovereign) authorized an appointed provisional body, despite the absence of any reference to such an institution in the relevant legal texts. Many leading Hong Kong politicians and the colonial government countered with a continued defense of the legal propriety of the Patten reforms and an attack on the Provisional Legislature as without legal foundation and lacking the electoral pedigree that the Joint Declaration and the Basic Law contemplated for the S.A.R.'s legislatures.¹⁰⁰

¹⁰⁰ For a more extended discussion of the issues addressed in this section, see deLisle & Lane, *Hong Kong's Endgame and the Rule of Law (I)*, *supra* note 83. In the political reform dispute, the most central legal provisions were Basic Law art. 68 (which the Chinese side cited for its mandate that Legco selection methods "shall be specified in light of the actual situation" in the S.A.R. and

The controversy surrounding the Bill of Rights Ordinance and other reforms to civil and political liberties-restricting laws was marked by a similar pattern. The China and pro-China side asserted that the Bill of Rights sought to create a new kind of quasi-constitutional law in Hong Kong, standing above and overriding ordinary ordinances. And, they added, the whole package of late colonial liberalization of public order and security laws, along with the Bill of Rights itself, violated the Joint Declaration's and Basic Law's provisions on legal continuity. China construed those provisions as mandating that the major laws in force in Hong Kong at the time of the Sino-British agreement would remain in force throughout the transition (or, at the very least, as not promising that any colonial laws substantially altered after 1984 would be received into S.A.R. law).

Their opponents in the political conflict again countered with equally law-focused arguments, maintaining that the Bill of Rights Ordinance was nothing "higher" than ordinary Hong Kong legislation, albeit of unusually great scope and importance. That is, it did nothing more than override some contrary legislation of equal status, establish a rule for judicial construction — not supersession — of future legislation, and provide conventional administrative and common law rights to judicial review. As to the amendments liberalizing specific laws on civil and political rights, British authorities and Hong Kong liberals found nothing persuasive in the suggestion that the Joint Declaration somehow froze certain unspecified domestic legislation in place (while clearly leaving the colonial government free to enact or amend other laws). And they invoked the Joint Declaration's and Basic Law's commitment to accepting into S.A.R. law the principles of the major United Nations Human Rights Covenants as a mandate for adopting some of the disputed legislative changes.¹⁰¹

"in accordance with the principle of orderly progress," but which also contains other language favored by China's adversaries, principally that Legco "shall be constituted by election" — a phrase that tracks Joint Declaration Annex I, § I, and the NPC Decision concerning the formation of the first S.A.R. legislature. Basic Law, *supra* note 4, art. 68.

¹⁰¹ The key legal provisions in this controversy were Joint Declaration paragraphs 3(3), 3(5), Annex I, §§ II, XIII (concerning laws previously in force and individual rights provisions); and Basic Law articles 8, 39, 24-42, 160 (concerning continuity in Hong Kong's laws, the status of the provisions of the U.N. human rights covenants, the catalogue of S.A.R. residents' rights, and issues of conflict between the Basic Law and laws previously in force), and, of

A similar dynamic, although with a different alignment of parties, characterized the controversy surrounding the Court of Final Appeal for the S.A.R. At the center of the conflict were proposed ordinances to establish the court, one rejected by a majority of Legco in 1991 and another that passed Legco in 1995. Here, China and the British authorities defended, as compatible with the Basic Law and the rule of law, bills that restricted the number of foreign judges on the bench to one and that (in the 1995 version) delayed establishment of the court until the final transition. The court, they maintained, satisfied all the explicit requirements of the Basic Law and the Joint Declaration, and saved Hong Kong's rule of law system from the perils of a legal vacuum that might occur if the court or other S.A.R. institutions were not ready to begin operation on July 1, 1997.

Some of Hong Kong's most ardent liberal politicians, meanwhile, attacked the court arrangement, again by resorting to legal arguments and arguments that assumed a special and central role for law. They criticized the proposed legislation as the product of a secret, perhaps even lawless Sino-British deal that stood in sharp contrast to the open, if Hong Kong-excluding, process that had produced the treaty-like Joint Declaration. They also decried the proposed legislation as inconsistent with the Basic Law's text (and a parallel provision in the Joint Declaration), which provided that the Court "may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal." They argued that such language prohibited (by its use of the plural as well as by the flexibility inherent in the phrase "as required") a fixed ceiling of one foreign national on the bench, and permitted at least two—and more where that was necessary to the Court's carrying out effectively its functions. More broadly, they dismissed the Court bills as corrosive of the rule of law for Hong Kong, rejecting the British authorities' arguments to the contrary.¹⁰²

The same sort of strongly law-focused discourse extended to the related (if less intense) debate about acts of state. When some in Hong Kong's pro-democracy camp raised the fear that China

course, the Bill of Rights Ordinance, and the Societies and Public Order Ordinances (as amended).

¹⁰² The provisions at the center of this controversy, and quoted in the text above, were article 82 of the Basic Law and Joint Declaration annex I, § III.

would further compromise the rule of law by construing provisions insulating acts of state from judicial review so broadly as to immunize the future S.A.R. government and P.R.C. companies from significant judicial review and civil suits, others of broadly similar political persuasion rejected this line of argument in favor of alternative analyses that were equally legal in substance and spirit. They criticized the proponents of the more critical and skeptical line for, in effect, muddying clear legal waters. They preferred to rely upon the persistence of the relatively narrow contours of established common law doctrine, and not to risk triggering yet another costly clash with China over yet another question of statutory construction.¹⁰³

Finally, the recent political skirmishes concerning the S.A.R. government-in-waiting have been fought in similarly law-related terms. When Tung Chee-hwa pointedly eschewed the title "Chief Executive-designate" in favor of his official post-July 1 moniker of "Chief Executive" and when the Provisional Legislature-to-be asserted its authority to consider legislation for the Hong Kong S.A.R. before the formal date of reversion, Hong Kong critics charged that such moves violated the framework legal documents which contemplated no such head-start in the exercise of sovereign authority by S.A.R. organs. For the British, a degree of gubernatorial cooperation with an in-coming executive was permissible and lawful, but allowing the usurpation of sovereign law-making authority before the treaty-specified moment of transfer of title was quite another matter. This distinction was, in part, a legal one about what the British sovereign had undertaken by treaty, and what existing Hong Kong law permitted: since the Joint Declaration and Hong Kong's colonial constitution and laws contemplate that, until July 1, 1997, Legco remains the only authorized legislative body for Hong Kong, it would be improper, even unlawful, for Hong Kong's colonial government to cooperate with the aggressive new body in Shenzhen.

In the territory's liberal and democratic circles, the whole affair more generally reinforced concerns about China's regard for any of the promises made with respect to post-reversion Hong Kong. For them, the P.R.C.'s moves suggested an attitude of lawlessness that undercut the credibility of the largely legal arrangements that the P.R.C. had accepted as setting the terms for

¹⁰³ The statute at issue was the Basic Law, *supra* note 4, art. 19.

the territory's future. When the China and pro-China camp rejected charges that the P.R.C. was grabbing power unlawfully, dismissing them as impermissible interference in an internal Chinese matter, their position seemed to suggest (especially to Hong Kong liberals and democrats) an air of indifference to legal limits. Yet, here too, there was a distinctly legal element to the P.R.C.'s argument. The claim was rooted firmly in the international legal position that China had long embraced and had made sure to enshrine in the Joint Declaration — that Hong Kong was, and always had been, subject to China's sovereignty and that the territory's governance, thus, had always been legally a function that China was free to take on whenever it so chose.¹⁰⁴

4.2. *Political Bases of a Turn to Law*

The broad scope of law's promised empire in managing the colony's reversion and structuring its operation as a Chinese S.A.R. — together with the oddly law-centered politics that it has spawned — is perhaps the most striking feature of transitional Hong Kong. It is more distinctive and arguably more noteworthy than the legal and political uncertainty or the debates about the modesty or majesty of real change that almost always accompany sudden shifts in the locus of formal sovereign authority, whether they occur through decolonization, revolution, imperial acquisition or other means.¹⁰⁵

Several primarily political factors, contributing in uncertain proportions, appear to underlie the remarkable turn to law in the process of handling Hong Kong's transition. The pressure of a politically inalterable deadline for reversion, in place from the earliest phases of negotiation over Hong Kong's future status (and even before), and the prospect of a decade and a half period between initial agreement and formal transfer of authority made the construction of an elaborate legal framework more feasible and seemingly necessary. On one hand, the early acceptance of the July 1, 1997 date for Hong Kong's return to China effectively ended the possibility of protracted negotiations over *whether* the

¹⁰⁴ On these "sovereignty issues," see generally, Joint Declaration, *supra* note 1, paras. 1, 2, and Basic Law, *supra* note 4, art. 1. See also Gilley, *Jumping the Gun*, *supra* note 90.

¹⁰⁵ Those more common place features are the foci of Sections 2 and 3 *supra*.

territory would be handed back (and in return for what). An impasse on such matters, of course, would have postponed indefinitely work on any legal arrangements to govern the transition and its aftermath. On the other hand, the long lag between the settlement of the sovereignty question and the ultimate transfer of authority meant that there would be time enough to negotiate, fight over, and perhaps put in place an elaborate structure of laws and institutions. More importantly, the lag meant that failing to do so risked an extended period of serious uncertainty that could leave the territory suspended for years in a ruinous limbo.

The fortuitous conjunction of official embraces of "legality" on both sides of the vanishing border also created an environment conducive to a resort to legal forms and norms in addressing the Hong Kong question. On the Hong Kong side, the colonial order accorded a special pride of place to the "rule of law," and perhaps never more than during the period of the turn to law to govern the transition process. In the 1980s, the drive to clean-up corruption in Hong Kong had achieved considerable success, and consideration of moves to eliminate illiberal and discriminatory colonial laws was underway. At the same time, Hong Kong's increasingly internationalized and service-oriented economy made the colony's highly regarded legal environment seem even more central to its success. And there was, as yet, no significantly implemented or politically salient principle of "democracy" to rival the "rule of law" in Hong Kong's pantheon of political values. On the other side, China during the same period was at the apogee of its post-Mao drive to create a new socialist legality compatible with its broader quest to build a modern economy and to secure an end to ideological excess. During the 1980s especially, an unprecedented torrent of new laws and regulations was pouring forth from legislative and administrative bodies. The judicial system and the number of lawyers were expanding exponentially. And, following on denunciations of the lawlessness of the Cultural Revolution decade, Party rhetoric was full of commitments to developing laws and ruling by law.

Further, the lack of political trust, and the rapidly growing imbalance of power, between China and its Hong Kong supporters and agents, on one side, and the British and Hong Kong liberals and democrats, on the other, pointed (especially for the latter group) to an embrace of law, *faute de mieux*. In that

political context, casting arrangements for Hong Kong's future in legal forms recognizable to and, it was to be hoped, recognized, and supported by much of the rest of the world was perhaps the most that Britain and local proponents of a relatively autonomous and open Hong Kong could achieve in their efforts to constrain China.

For China and its agents and allies, the context also suggested some virtues in a potentially constraining turn to law. Putting its Hong Kong policy in legal form allowed China an additional, relatively persuasive means to signal to the world its avowed benign intentions toward the territory. It also gave China and its Hong Kong spokesmen and supporters an additional, seemingly "neutral" and less purely "political" basis for checking and challenging the liberalizing and democratizing excesses that China feared the departing colonial authorities would commit, with the connivance of some of the territory's "subversive" politicians and activists. For a P.R.C. regime that has not been completely indifferent to international opinion and pressure, there is surely something attractive in being able to denounce moves toward greater democratization and expanded civil liberties as lawless actions or breaches of international legal promises, and not just as moves that China has found politically unpalatable.

4.3. *Law and Hong Kong's Transition: Issues and Interests Beyond the "1997 Question"*

Questions of its origins aside, law's promised central role in steering Hong Kong through its transition has deepened and diversified the interests outsiders have in Hong Kong's transition to Chinese rule, and its aftermath. Much of that stake is obvious and material. A disruptive transition could put at immediate risk the economic health of the world's eighth largest trading entity and one of the main hubs of investment and commerce in the world's most dynamic region. That, in turn, would imperil the continuation of the rapid growth of China's vast economy in which Hong Kong has played a vital role. The consequences, of course, would be substantial for investors, traders, and consumers everywhere. More indirectly, a heavy-handed Chinese approach to Hong Kong's civil and political liberties and derogations from its legally promised autonomy could mean that Western investors and traders would again face the kinds of economic concerns abroad and political pressures and legal restrictions at home that

prompted some to back away, albeit briefly, from pursuing deals with China after the Tiananmen Massacre of 1989.

Strategically, a troubled post-reversion era in Hong Kong could bring dangerous regional and global repercussions. Additional strains in the troubled U.S.-China relationship would surely follow. Some mechanisms for a U.S. response are already set forth in the 1992 U.S.-Hong Kong Policy Act, which authorizes the president to deny Hong Kong much of the favorable trade, visa and other privileges the territory currently enjoys (and to subject it instead to the treatment accorded the rest of the P.R.C.) if the president finds that China has failed to keep Hong Kong "sufficiently autonomous" to justify Hong Kong's separate treatment. Early hints of a broader reaction perhaps can be found in a recent federal district court decision denying an extradition request from Hong Kong, and expressing concern about cooperating where "[a]lready there are signs that the Hong Kong Special Administrative Region judicial system will appear very much like the Chinese judicial system." China's reaction to such Western criticism or sanctions is even easier to anticipate. It would doubtless include a good deal of nationalist chest-thumping and a redux of the familiar attack on Western moves as affronts to Chinese sovereignty and impermissible interference in what China deems its internal affairs.¹⁰⁶

A problem-filled transition and rising repression in Hong Kong, and an accompanying deterioration in U.S.-China ties would also bode ill for mainland-Taiwan relations. With the "one country, two systems" model for reintegrating Taiwan thus cast into doubt and China resorting to a more aggressive and intransigent nationalism, one of the most volatile issues in the region would become even more explosive.

To many interested observers, such global and regional

¹⁰⁶ Hong Kong Policy Act, 22 U.S.C. 5722(a) (1992); *Lui v. United States*, 1997 U.S. Dist. LEXIS 801 at *25-*26 (D. Mass.), *rev'd*, 1997 U.S. App. LEXIS 5225 (1st Cir.) (denying extradition of Hong Kong citizen Jerry Lui, and finding that Senate ratification of treaty permitting extradition to British-ruled Hong Kong could not be construed to authorize extradition, in effect, to a sovereign other than the treaty's signatory, whose credibility and trust — and the character of whose legal system — the Senate had not weighed and judged); *The United States Has No Right to Interfere in Hong Kong Affairs*, TA KUNG PAO, Mar. 14, 1997, at 2 (criticizing congressional criticism and skepticism about China's likely post-1997 treatment of Hong Kong as impermissible interference in Chinese internal affairs).

economic and political concerns appear to be closely bound up with the fate of the law, legality and the legal arrangements for the future S.A.R. in Hong Kong. At the very least, a widely shared belief holds that Hong Kong's "rule of law" environment is a vital part of its economic success, and that moves undermining a rule of law for economic affairs would risk killing the goose that has, for China and for so many others, laid so many golden eggs. A somewhat more narrowly accepted perspective sees a serious threat to the economic rule of law (and therefore prosperity) in potential retrenchments of Hong Kong citizens' civil and political liberties and the S.A.R.'s autonomy. And, as the U.S.-Hong Kong Policy Act and the U.S. district court's extradition decision in part suggest, a pervasive view in the legally-minded (on some accounts, law-obsessed) West sees close, if complex, connections between rule-of-law principles and a host of political "goods," including democratic values, human rights, and, indirectly, international political stability. On this view, an erosion of Hong Kong's legal order or a betrayal of legal promises about Hong Kong's post-1997 governance are one possible route — and perhaps a relatively likely one — to disorder and repression in Hong Kong and diplomatic tensions and multilateral conflict spreading beyond the region.

These legal aspects of primarily non-legal concerns still do not capture the full extent of the stake that much of the outside world — or at least its liberal and legalist corners — holds in the fulfillment of law's promised roles in Hong Kong's transition. Also on display, and on trial, is the capacity of law to manage and shape a delicate, complex and potentially chaotic process of change. The arrangements developed through the Joint Declaration, the Basic Law, the controversial legislative moves following in their wake, and the law-centered Hong Kong politics of the 1980s and 1990s collectively define one of the major Promethean projects that law has undertaken in the contemporary world. Pursuing such an ambitious agenda, having had such ambivalent origins, and facing a presumably inhospitable environment at the fault lines between radically different ideologies, legal cultures, and levels of political power, law's imperial program for transitional Hong Kong may also be among its more Herculean tasks.

In those precincts around the globe where the rule of law and rule by law are valued, whether instrumentally or as goods in their own right, there is a strong rooting interest in the outcome.

If the legal framework and the public and official commitment to law succeed in steering Hong Kong through the jolt of reversion and the longer process of transition, or even if norms of legality and a liberal legalism survive in Hong Kong only as resilient irritants to a recalcitrant P.R.C.-controlled regime, then it will be testimony to the powerful attraction and tenacity of those ideas even in supposedly unfriendly political and civilizational contexts. The visible reach of law's empire will have extended a bit further, and its grasp will have become a bit firmer, and its versatility and adaptability a bit clearer.